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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS

JANUARY 1, 1987 TO JUNE 30, 1987

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JANUARY 1, 1987 TO JUNE 30, 1987

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Took oath of office April 21, 1986

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Took oath of office October 29, 1979

TERRY CALVANI, *Commissioner*
Took oath of office November 18, 1983

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

ANDREW J. STRENIO, JR., *Commissioner*
Took oath of office March 17, 1986.

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

NATIONAL FIRE HOSE CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C–2935. Consent Order, Nov. 1, 1978—Set Aside Order, Jan. 6, 1987

The Federal Trade Commission has set aside a 1978 consent order with National Fire Hose Corp. (92 F.T.C. 660), thus removing restrictions on the company's relations with its distributors.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON NOVEMBER 1, 1978

On September 5, 1986, respondents National Fire Hose Corporation, Raymond L. Pepp and Dudley H. Pepp ("National") filed their Petition To Reopen Proceeding and To Set Aside Consent Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, requesting that the Commission set aside or modify the order in Docket No. C–2935, issued on November 1, 1978. The order, among other things, prohibits the respondents from restricting or limiting the territory in which a distributor may sell National's products. The Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that National, the leading domestic manufacturer and seller of fire hose, had, by imposing territorial restrictions on its distributors of municipal fire hose, restricted competition among distributors of National's products and foreclosed the entry of new distributors into competition with National's distributors. The order prohibits National from restricting the territories in which its distributors may sell National products, from restricting the customers to which a distributor may sell and from communicating with any distributor about the establishment of new distributor-

ships.[1]

In the Petition, National asserts that the prohibitions of the order hinder National from developing an effective and efficient distribution program and that, as a result, the order has placed National at a competitive disadvantage in the municipal fire hose market. National notes that none of its competitors is currently subject to the restrictions imposed on National by the order. National claims that setting aside the order would enable National to become a more effective interbrand competitor, because National would be able to foster the promotional and sales development efforts of its local distributors. National's local distributors presently are reluctant to undertake such efforts, because they risk losing business to distant National distributors who exploit the market created through the efforts of National's local distributors.

Based on the information provided by National and other available information, the Commission has concluded that National has failed to make a satisfactory showing of changed conditions of fact or law that require reopening. The Commission has determined, however, that the public interest warrants reopening the proceeding in Docket No. C–2935 and setting aside the order. National's inability under the order to impose otherwise lawful territorial restrictions on its fire hose distributors may impede National's ability to compete by lessening the efficiency of National's distribution system and by discouraging distributors from offering and promoting National's products. In addition, purchasers of National's municipal fire hose may have difficulty obtaining post-sale services and training from distributors that have lost sales due to "free riding" by other distributors and, therefore, may be exposed to increased risk of injury. As a result, National may be exposed to personal injury claims.

The impediments to effective competition resulting from the order outweigh any reasons to retain the order. There do not appear to be any significant impediments to entry into either the manufacture or distribution of fire hose, and, in fact, significant entry has occurred since the order in this case was entered. An absolute prohibition upon the use of territorial restrictions by National appears to be no longer necessary under the facts presented, because National's use of exclusive territorial arrangements with its distributors is unlikely to foreclose competitors from distributional outlets.

The legality of distributional restraints, such as territorial restrictions, standing alone or coupled with exclusive distribution arrangements, must be determined on a case by case basis under applicable legal standards. Under the particular circumstances of this case, the

[1] The order prohibits National from imposing territorial restrictions on its distributors. The order does not bar National from entering into exclusive distributorship agreements with its distributors.

likely impediment to National's ability to compete outweighs any need to retain the order, and it is therefore in the public interest to set aside the order in this case.

Accordingly, *it is ordered* that the order of November 1, 1978, in this matter be, and it hereby is, set aside.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF

GLENDINNING COMPANIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8824. Consent Order, Oct. 26, 1976—Modifying Order, Jan. 13, 1987

The Federal Trade Commission has modified a 1976 consent order with respondent (88 F.T.C. 656) by lifting a prohibition against running skill contests that are not based on "matters of established provable fact." Provisions in the original consent order that required skill contests to be based on reference materials that are available in the typical public library and disclosure of the reference books containing the answers were replaced in the modified order with new provisions requiring that correct answers be ascertainable from "authoritative reference works" and that contestants be informed of that fact.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 15, 1986, Glendinning Associates, Inc. (Petitioner), successor to the respondent under the order, Glendinning Companies, Inc., filed a request to reopen and modify the consent order issued by the Commission on October 26, 1976, in Docket No. 8824. (88 F.T.C. 656.)

The request to reopen and modify the consent order was placed on the public record on October 9, 1986, and a press release concerning the petition was issued on the same date. A notice of 30–day period for public comments on the petition was published in the *Federal Register* on October 24, 1986 [51 FR 37741 (1986)]. The public comment period ended on November 10, 1986, and no comments were filed. The deadline for the Commission to rule on Petitioner's request was January 13, 1987.

Petitioner is engaged in the manufacture, promotion, sale, and distribution of promotional games used to induce the sale of consumer products. Paragraph 1 of the order relates to all promotional games, contests and sweepstakes in which a prize is offered. Paragraph 2 relates only to skill contests. Petitioner asserts that the public interest requires that the Commission replace Paragraph 2 with a new Paragraph 2.

Paragraph 2 now orders Petitioner to cease and desist from:

2. Engaging in, promoting the use of, or participating in the development or operation of any skill contest, unless:

a. The skill contest is based solely on matters of established, provable fact.

b. The factual subject matter is obtainable from readily available reference materials, *e.g.*, those available in the typical public library.

c. Contest materials and advertising disclose clearly and conspicuously that a substantial degree of skill is involved and also the specific reference works on which the answers are based (*e.g.*, a specific dictionary, encyclopedia, atlas, or historical work), and contest rules and directions clearly provide all necessary information for the contestant to participate successfully.

d. Questions and answers with complete supporting data as outlined in Paragraphs (a) and (b) and complete judging procedures are filed with an independent organization prior to promotion implementation.

e. The correct answers and a list of winners is made available to participants upon request and filed with an independent organization within 60 days of the close of judging of the competition.

f. Respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

Petitioner argues that the unintended effect of the order is to preclude it from conducting any skill contest except those based on "established provable fact." Therefore, Petitioner contends that it is forbidden by the order from conducting other skill contests such as those involving "checker problems, chess problems, crossword puzzles, photography or drawing contests, poetry contests and contests awarding prizes for the best jingle, slogan, product name, letter, or essay."

Petitioner argues further that subparagraph b. of Paragraph 2 prevents it from conducting a current events or contemporary history quiz dealing with recent events because the answers to such quizzes may not be readily available in published reference materials in the typical public library. A trivia quiz may also be questionable, according to Petitioner, because the typical public library "may not have reference materials concerning sports data, motion picture lore, or data on operas, broadway shows, radio and television shows, their stars and plots."

Petitioner asserts that the requirement in subparagraph c. of Paragraph 2 that contest materials and advertising disclose the specific reference works on which answers are based, "(*e.g.*, a specific dictionary, encyclopedia, atlas or historical work)," reduces a skill contest to a research project. Under such conditions, Petitioner argues, almost every contestant could become a winner by looking up the answers in the reference books. Therefore, according to Petitioner, large prizes could not be offered and there would be no incentive to participate if nominal prizes were offered.

Petitioner's proposed Paragraph 2 restructures order Paragraph 2 so that the requirements that apply to all skill contests are set forth

in new subparagraphs (a) and (b) and those requirements that apply only to skill contests based on fact are listed separately under new subparagraph (c). The Commission considers this modification to be in the public interest because it would permit Petitioner to conduct games of skill that are not based on fact, while preserving the essential requirements of the order. For games of skill based on fact, the modification would eliminate the requirement in subparagraph b. that the factual subject matter be "obtainable from readily available reference materials, *e.g.*, those available in the typical public library." This modification is, in the view of the Commission, in the public interest as it would permit Petitioner to conduct skill contests based on recent events and trivia quizzes that may not be found in reference materials that are readily available in the typical public library. Furthermore, not all answers to a contest need come from a single reference source. However, the answers must be ascertainable from "authoritative reference works."

Petitioner's proposed Paragraph 2 would also eliminate the requirement in subparagraph c. that the specific reference works where answers may be found be disclosed. This modification serves the public interest as it would enable Petitioner to stimulate interest in its contests by offering large prizes. As Petitioner points out in its petition, anyone could win under the order by merely going to the stated reference books and looking up the answers. Therefore, large prizes could not be offered.

Petitioner has not demonstrated a change of law or fact to support its request that the order be reopened and modified as requested, in accordance with Section 5(b) of the Federal Trade Commission Act. However, the facts presented by Petitioner have persuaded the Commission that the public interest requires that the order be reopened and modified as requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, and modified on February 24, 1981, is hereby further modified to read as follows:

Order

It is ordered, That respondent Glendinning Companies, Inc., a corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of Coca-Cola, Tab, or any food or other product, or in connection with the sale or distribution of "Big Name Bingo," or any other promotional game, contest, sweepstake or similar device which involves or offers the awarding of a prize or anything of value to participants therein,

by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Engaging in, promoting the use of, or participating in any such promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(a) All of the requirements, terms and conditions for participating therein and for entitlement of such prizes are clearly and conspicuously set forth in each advertisement or notice which purports to explain or illustrate the operation of, manner of participation in, or the basis for or prospects of becoming entitled to or receiving a prize in connection with, any such contest or promotional game.

(b) All such prizes are in fact awarded to all participants therein whose entries conform to the stated requirements, terms and conditions for entitlement to and receipt of such prizes.

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative.

2. Engaging in, promoting the use of, or participating in the development or operation of any skill contest, unless:

(a) Contest materials and advertising disclose clearly and conspicuously that a substantial degree of skill is involved and, contest rules and directions clearly provide all necessary information for the contestant to participate successfully.

(b) Respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

(c) In any skill contest based on fact: (1) each correct answer or solution is ascertainable from authoritative reference works; (2) the contest materials and advertising disclose, clearly and conspicuously in addition to the disclosures required by Paragraph 2(a), that the answers are ascertainable from authoritative reference works; (3) questions and answers with complete supporting data and complete judging procedures are filed with an independent organization prior to promotion implementation; and (4) the correct answers and a list

of winners is made available to participants upon request and filed with an independent organization within 60 days of the closing of judging of the competition.

For purposes of this order a *skill contest* is defined as any promotional contest or device in which the award of a prize or anything of value to the participants is determined on the basis of the winning answers or solutions submitted by participants through the exercise of a substantial degree of skill in determining the winning answers or solutions to the questions or problems which are the subject of the contest or device.

In the event that the Commission promulgates a final trade regulation rule concerned with skill contests, then such trade regulation rule shall completely supersede and replace Paragraph 2 and such trade regulation rule shall become part of this order.

It is further ordered, That the terms of this order shall not apply to a promotional game, contest or device conducted by or under the direction of a governmental instrumentality, or where the respondent neither knew nor had reason to know of failure to comply with the terms of this order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

In the Matter of

INTERNATIONAL MASTERS PUBLISHERS INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3205. Complaint, Jan. 14, 1987—Decision, Jan. 14, 1987

This consent order requires, among other things, a Los Angeles mail-order seller of recipe cards to honor cancellation and return requests in a timely manner and prohibits respondent from misrepresenting its return and cancellation policies.

Appearances

For the Commission: *Jerome M. Steiner, Jr.*

For the respondents: *Anne B. Roberts, O'Donnell & Gordon,* Los Angeles, Calif.

Complaint

The Federal Trade Commission, having reason to believe that International Masters Publishers Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

Paragraph 1. Respondent International Masters Publishers Inc., is a California corporation. It has its principal office or place of business at 4929 Wilshire Blvd., Los Angeles, California.

Par. 2. Respondent has advertised, offered for sale, sold, and distributed recipe cards directly to the public through a continuity sales program entitled "My Great Recipes."

Par. 3. The acts or practices of respondent alleged in this complaint were in or affecting commerce.

Par. 4. In the course and conduct of its business, and in order to induce the sale of its recipe cards, respondent disseminated directly to consumers certain promotional materials and advertisements, an example of which is attached hereto as Exhibit A.

Par. 5. Statements contained in said promotional materials included:

A. We'll also send you 72 additional cards for free examination. If you are not satisfied with these additional cards, simply return them. There is no obligation whatsoever.

B. [A]bout every 3 to 4 weeks, we'll send you an additional 3 packages of 24 recipe cards each, at $2.25 per package, plus a small charge for postage and handling. You are never under any obligation to accept a package of recipe cards. *And*, you may discontinue receiving recipes at any time. The free gifts are yours to keep regardless.

I.

Alleging violations of Section 5(a) of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 6. Through the use of the statements referred to in Paragraph Five, and others not specifically set forth therein, respondent represented, directly or by implication, that respondent would honor enrollment cancellation requests within a reasonable period of time.

PAR. 7. In truth and in fact, respondent did not honor enrollment cancellation requests within a reasonable period of time. In many instances, consumers who refused to pay for cancelled enrollments were billed and dunned by respondent for nonpayment, and had their accounts referred to collection agencies. Therefore, the representations set forth in Paragraph Six were, and are false and misleading, and the acts and practices described in this paragraph were, and are, unfair.

PAR. 8. The representations, acts, and practices set forth above were likely to induce consumers to order respondent's recipe cards and to receive and pay for recipe cards after cancellation. Respondent's representations, acts, and practices thus caused substantial consumer injury that was not outweighed by countervailing benefits to consumers or competition and was not reasonably avoidable by consumers. Therefore, dissemination of respondent's representations, and respondent's acts and practices constituted and constitute unfair and deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act.

II.

Alleging violations of Section 5(a) of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 9. Through the use of the statements referred to in Paragraph Five, and others not specifically set forth therein, respondent represented, directly or by implication, that respondent would honor returns of recipe cards within a reasonable period of time.

PAR. 10. In truth and in fact, respondent did not honor returns of recipes cards within a reasonable period of time. In many instances, consumers who refused to pay for returned merchandise were billed

and dunned, and had their accounts referred to collection agencies. Therefore, the representations set forth in Paragraph Nine were, and are, false and misleading, and the acts and practices described in this paragraph were, and are, unfair.

PAR. 11. The representations, acts, and practices set forth above were likely to induce consumers to order respondent's recipe cards and to pay for recipe cards returned to respondent. Respondent's representations, acts, and practices thus caused substantial consumer injury that was not outweighed by countervailing benefits to consumers or competition and was not reasonably avoidable by consumers. Therefore, the dissemination of respondent's representations, and respondent's acts and practices constituted and constitute unfair and deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

III.

Alleging violations of Section 5(a) of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated herein by reference.

PAR. 12. In the course and conduct of its business and for the purpose of collecting debts allegedly resulting from consumer purchases of recipe cards, respondent disseminated various collection and dunning notices to consumers. Examples of said notices are attached hereto as Exhibits B and C.

PAR. 13. Statements contained in such materials included:

A. Unless payment is received within ten days of this notice, your account will be forwarded to a national credit bureau which maintains a national delinquent account file. This alone may result in severe restrictions on your future credit transactions.

B. Moreover, I will be compelled to forward your name to a national credit bureau which maintains a national delinquent account file. This could seriously impair your valued credit rating and restrict future credit dealings of all kinds until this matter is settled.

PAR. 14. Through the use of the statements set forth in Paragraph Thirteen, and others not specifically set forth therein, respondent represented, directly or by implication, that referral of a consumer's name to the credit reporting agency with which respondent deals may adversely affect the consumer's ability to obtain credit for typical consumer transactions.

PAR. 15. In truth and in fact, referral of a consumer's name to the credit reporting agency with which respondent deals would not adversely affect the consumer's ability to obtain credit for typical con-

sumer transactions. Therefore, the representation set forth in Paragraph Fourteen was, and is, false and misleading.

PAR. 16. The representations set forth above were likely to mislead consumers into the erroneous belief that the representations were true and to induce the payment of alleged debts by virtue of said erroneous belief. Therefore, respondent's representations constituted and constitute deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act.

PAR. 17. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

great recipes OF THE WORLD

U.S. COURT ORDERS FREE RECIPES SENT TO SUBSCRIBERS OF GREAT RECIPES OF THE WORLD

As a paid subscriber to Great Recipes of the World, you are entitled to all of the following by returning your enclosed rebate check:

72 Recipe Cards	- ~~$ 8.75~~	- FREE!
33 Divider Cards	- ~~$ 1.50~~	- FREE!
12 Blank Cards	- ~~$ .95~~	- FREE!
1 Recipe File Box	- ~~$ 9.75~~	- FREE!
Total:	~~$18.95~~	- FREE!

We'll also send you 72 additional cards for free examination. If you are not satisfied with these additional cards, simply return them. There is no obligation whatsoever. And the other free gifts are yours to keep regardless.

You must return the enclosed rebate check in order to receive your free gifts. The rebate check is not transferable — it is made out to you, and can only be used by you alone. We can ship only to the name on the check (address corrections are acceptable.)

These free gifts are offered in exchange for the balance of the "Great Recipes of the World" issues owed to you. "Great Recipes of the World" will no longer be publishing their magazine.

My Great Recipes®, a company well established in the recipe card business, is making this offer as a way of introducing our recipes to you. However, by sending in the rebate check, you are not obligated to buy anything whatsoever!

Once you send in your rebate check, we will send you all the items mentioned earlier. Then, about every 3 to 4 weeks, we'll send you an additional 3 packages of 24 recipe cards each, at $2.25 per package, plus a small charge for postage and handling. You are never under any obligation to accept a package of recipe cards. And, you may discontinue receiving recipes at any time. The free gifts are yours to keep regardless.

Our recipes are quick and easy. Each recipe is beautifully photographed and protected with a special laminated coating. All recipes are stain-proof, waterproof, and chip-proof. If you should ever lose one, we'll replace it free of charge.

EXHIBIT A
P. 1 OF 4

(over please)

5

Send in your rebate check today. The free gifts are yours to keep, by order of the U.S. Court. But you must send in your rebate check to receive them!

Hurry, this offer expires May 31, 1985. Send in your rebate check today.

Sincerely,

Mary Masters

Mary Masters

P.S. — Remember, sending in your rebate check does not obligate you to buy anything. We can only ship you your free gifts after we've received your rebate check. The reply envelope enclosed requires no postage.

EXHIBIT A
P. 2 OF 4

Mary Masters, My Great Recipes [illegible]

My Great Recipes®

4929 Wilshire Blvd.
Los Angeles, CA 90010

The U.S. Court has given you the opportunity to exchange what is now basically a worthless subscription, for valuable products.

There's no obligation or hidden catch of any kind.

My Great Recipes® is doing this because we know you'll be so pleased with our quick and easy recipes, you'll want to buy more. By sending in your rebate check, you'll get a "taste" of our recipes. And we're so sure you'll hunger for more, we're willing to give you $18.95 worth of free gifts.

Even though the balance of the issues owed you is less than $18.95, our policy is to make sure you're satisfied. We do that by giving you quick and easy recipes, better quality, top-notch service, and value. Our thousands of satisfied customers know this to be true.

All you have to do to receive your free gift is to check "yes" on your enclosed rebate check, and return in the enclosed postage-paid envelope.

Do it now, while you have this in your hand. There's no obligation to buy anything.

Sincerely,

Eric A. Miller

Eric Miller
Vice President
My Great Recipes

P.S. - The time limit on this offer makes it important for you to send back the rebate check today.

2138

EXHIBIT A
P. 3 OF 4

NON—NEGOTIABLE

C149

GREAT RECIPES OF THE WORLD
My Great Recipes®
P.O. Box 76926
4929 Wilshire Blvd.
Los Angeles, CA 90010

1876

EXHIBIT A
P. 4 of 4

☐ **YES!** I want to exchange the balance of the "Great Recipes of the World" issues owed to me for the offer outlined in this letter. I understand the free gifts are mine to keep with no obligation, by order of the U.S. court.

☐ **NO.** Do not exchange the balance of the "Great Recipes of the World" issues owed to me for the offer outlined in this letter. I understand that no additional issues of "Great Recipes of the World" magazine will be sent to me. I also am aware that the Court has made no provision for subscribers other than the free gifts as outlined in this letter.

Check one box only, and return in the enclosed postage paid envelope.

EIGHTEEN AND NINETY FIVE/100 DOLLARS **$18.95**

PAY TO THE ORDER OF
ZELMA G MANKHEY
16720 191ST PL NE
WOODINVILLE, WA 98072

Memo: This rebate check, if received by May 31, 1985 may be used in exchange for the offer outlined in the enclosed letter.

PHYSICAL
EXHIBIT H ITEM 8
FILE NO. 862-3262

Eric A. Miller

Non-transferable
190694

EXHIBIT B

My Great Recipes®

4929 Wilshire Boulevard, Suite 600, Los Angeles CA 90010 (213) 936-9122

Dear Member:

By now you have received several sets of my great tasting recipes, but I was surprised to see you have not paid for any of them yet.

Please take a moment to review the enclosed statement of your account, and if there are any problems let me know right away. The amount due reflects a total of all shipments sent to you thus far, however, you may not as of yet received the last shipment.

Unless payment is received within ten days of this notice, your account will be forwarded to a national credit bureau which maintains a national delinquent account file. This alone may result in severe restrictions on your future credit transactions.

In order to avoid such a drastic measure please mail your check today using the enclosed envelope.

Cordially,

Mary Masters

MAKE CHECK OR MONEY ORDER PAYABLE TO:
My Great Recipes®
4929 WILSHIRE BLVD., LOS ANGELES, CA 90010

KEEP THIS STUB

ACCOUNT NUMBER
23-15187297

PLEASE! Return this portion with your payment to insure proper credit to your account.

AMOUNT
42.16

Write your account No. on check and envelope

YOUR ACCOUNT NUMBER		DATE	
23-15187297	S9	04/24/84	

SHIP DATE	SET NO.	AMOUNT
04/21/84	20,21,22	8.45
03/31/84	32,33,34	8.45
03/10/84	35,36,37	8.42
02/20/84	29,30,31	8.42
01/30/84	47,48,49	8.42

MISS LORI APGAR
200 LONE-TREE RD
HOLLISTER CA 95023

0103231518729700042160 15

PAYABLE UPON RECEIPT

AMOUNT
42.16

RETURN THIS PORTION

enclosed

EXHIBIT B

EXHIBIT C

My Great Recipes®

[illegible] Wilshire Boulevard, Suite [illegible], Los Angeles, CA [illegible] (213) [illegible]

Dear Member:

Your account is now seriously past due. You have failed to live up to the terms of your membership agreement.

And, you have failed to advise us of any problems as we patiently asked. So, we can only assume you are using and enjoying the recipes we have sent you thus far, in good faith.

I have been forced to halt any further shipments, a step we always take with greatest regrets. Your 10-day evaluation period has expired. You cannot return the recipes we sent under terms of our agreement. However, this in no way cancels your outstanding balance owed.

Moreover, I will be compelled to forward your name to a national credit bureau which maintains a national delinquent account file. This could seriously impair your valued credit rating and restrict future credit dealings of all kinds until this matter is settled.

This is a drastic measure. I would much rather receive your check within the next ten days and avoid such action.

Eric Gordon,

Eric Gordon

Credit and Collection Manager

EXHIBIT C

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent International Masters Publishers Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 4929 Wilshire Blvd., Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Continuity sales plan* means a sales plan requiring the consumer to receive periodic installments of merchandise or services on approval.

B. *Billing cycle* means that period of time between the sending of one scheduled invoice or billing document (whether accompanying a

shipment of goods or not) and the sending of the following scheduled invoice or billing document.

C. *Return* means any item returned under the provisions of a continuity sales plan, as defined above.

D. *Received by respondent* or *receipt by respondent* includes material received at any mail drop respondent has established.

I.

It is ordered, That respondent International Masters Publishers Inc. ("IMP"), its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of recipe cards or any other product or service by means of a continuity sales plan in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, any term or condition for cancellation of enrollment or return of merchandise, or misrepresenting, in any manner, directly or by implication, any right granted to, or any duty or obligation imposed on, any consumer.

B. Failing, by the end of the first billing cycle following the billing cycle in which a consumer's request for cancellation of enrollment is received by respondent, to cancel that consumer's enrollment, and, if thereafter the consumer is contacted in connection with any obligation arising out of the enrollment, to notify that consumer in writing that the enrollment has been cancelled.

C. Sending a consumer more than one additional installment of merchandise following receipt by respondent of an enrollment cancellation request.

D. Failing, by the end of the first billing cycle following the billing cycle in which a consumer's return of merchandise or goods is received by respondent, to credit that consumer's account for the return, and, if thereafter the consumer is contacted in connection with any obligation arising out of the enrollment, to notify the consumer in writing that the account has been credited for the return; *provided, however,* that such written notification may be made in a scheduled billing document or in a separately mailed document.

E. Failing to include in the first communication from respondent to each consumer following enrollment in any of respondent's continuity sales programs the statement attached hereto as Attachment A, or a statement similar thereto, explaining return and cancellation poli-

cies; *provided, however,* that should respondent represent to consumers that cancellations of enrollment, credits for returns of merchandise, or the sending of written confirmations thereof will be accomplished in a shorter time than required under Paragraphs I. B or I. D of this order, respondent, its successors and assigns, shall amend Attachment A to conform with such representation.

II.

It is further ordered, That respondent International Masters Publishers Inc., its successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any recipe card or other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any consumer's credit rating will or may be adversely affected, or representing, in any manner, directly or by implication, that there will or may be any adverse consequence to failing to pay any amount claimed to be delinquent, unless there is a reasonable likelihood such rating will be so affected or such consequence will occur.

III.

It is further ordered, That for five (5) years after the date of service of this order respondent, its successors and assigns shall maintain, and upon written request make available to the Federal Trade Commission for inspection and copying the following records:

A. For a period of two (2) years from the date of receipt, all documents containing, reflecting, or referring to each consumer complaint relating to cancellation of enrollment in a continuity sales plans, return of merchandise, alleged billing error, or collection effort, as well as such documents or records as will disclose any response thereto.

B. For a period of one year from the date of receipt, copies of each written request for cancellation of enrollment received during the week starting with the third Monday of each month.

C. For a period of one year from the date of preparation, records sufficient to show the date on which each return of merchandise and request for cancellation was made effective.

D. For a period of two years from the date of their last use, specimen copies of all form communications, promotional materials, and adver-

tisements as well as documents sufficient to show the period of time when such documents or materials were in use.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, submit to the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

ATTACHMENT A

IMPORTANT INFORMATION: PLEASE RETAIN FOR YOUR RECORDS

RETURNING MERCHANDISE

To return merchandise to us at no cost to you, simply place the goods in the original package, reseal it, and deposit it in a mailbox. Please allow up to two billing cycles [number of days in two billing cycles] for us to process the return. If you receive an invoice or other request for payment for the merchandise returned, you do not need to pay it.

CANCELLATION INFORMATION

You may cancel your enrollment in our program by calling, [number] or by writing to us at [address]. Please allow up to two billing cycles [number of days in two billing cycles] for us to process the cancellation.

In some circumstances, because of unforseen delays, you may receive one additional shipment from us. If so, merely return the merchandise and any enclosed invoice to us. You will not be charged for that shipment.

In the Matter of

SOLAR AGE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3206. Complaint, Jan. 28, 1987—Decision, Jan. 28, 1987

This consent order prohibits, among other things, an Albuquerque, N.M. manufacturer and seller of solar energy heaters from misrepresenting the efficacy and performance of its solar space heaters or any other kind of solar energy equipment, unless it can substantiate its claims. Additionally, respondent is prohibited from using the phrase "up to" in energy-related claims, unless the upper limit of potential savings indicated in the claim can be achieved by an appreciable number of consumers.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondent: *Robert N. Singer, Singer, Smith & Powell,* Albuquerque N.M.

Complaint

The Federal Trade Commission, having reason to believe that Solar Age Industries, Inc. ("Solar Age"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

Paragraph 1. Solar Age Industries, Inc. is a Nevada corporation with its principal office or place of business at 6400 Uptown Boulevard, Northeast, Albuquerque, New Mexico.

Par. 2. Respondent manufactures, advertises, offers for sale, sells and distributes solar energy equipment including, *inter alia,* a "solar space heater" which consists of one or more rooftop collectors, one hot and one cold air duct and one small inlet fan, and which is designed to collect, but not store, the sun's rays for supplemental heating of individual residences or other small buildings.

Par. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

Par. 4. In advertisements and through the use of consumer testimonials contained therein, and through promotional materials disseminated to respondent's distributors, respondent has made various statements about the energy savings capability and area heating

capability of its solar space heater sold under the brand name "Solar Age Model 37," or sometimes referred to as "Solar Age Manufacturing Hot Air Collector Kit." Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the advertisements attached hereto as Exhibits A, B and C:

Cut your heating bills up to 40%.

* * * * * * *

. . . with a Solar Age Manufacturing Hot Air Collector Kit you can cut [heating] costs almost in half.

* * * * * * *

Our Solar Age system has reduced our gas bills by over 30%.

* * * * * * *

Enough [BTUS] to heat 600–800 sq. ft.!

* * * * * * *

Our Solar Age heating system heats our whole house, even the garage!

* * * * * * *

Solar Age Mfg. Collector Kits have an average 4 year pay back period.

* * * * * * *

Solar Age Manufacturing collectors have been given a higher BTU output rating per square foot than any other in the country.

PAR. 5. Through the use of the above statements, and other statements in advertisements not specifically set forth herein, respondent has made the following material representations, directly or by implication:

1. Use of the Hot Air Collector Kit will save an appreciable number of consumers 40% or close to 40%, and possibly as much as 50%, on their heating bills under reasonably foreseen circumstances.

2. Advertised savings of over 30% on the heating bills of one consumer reflect savings that other consumers will obtain with the use of the Hot Air Collector Kit under reasonably foreseen circumstances.

3. The Hot Air Collector Kit will provide enough heat to heat 600–800 square feet of space in residences or other small buildings under reasonably foreseen circumstances.

4. Advertised whole-house heating of one consumer's residence with the use of the Hot Air Collector Kit reflects the heating performance that other consumers will obtain under reasonably foreseen circumstances.

5. It will take an average of 4 years for consumers to save enough money on their heating bills by using the Hot Air Collector Kit to recoup the retail cost of the Hot Air Collector Kit.

6. Solar Age collectors are the highest BTU-rated collectors, per square foot, in the country.

PAR. 6. In truth and in fact:

1. Few, if any, consumers will save 40% or close to 40%, on their heating bills as a result of using the Hot Air Collector Kit under reasonably foreseen circumstances.

2. Advertised savings of over 30% on the heating bills of one consumer do not reflect savings that other consumers will obtain with the use of the Hot Air Collector Kit under reasonably foreseen circumstances.

3. The Hot Air Collector Kit will almost never be able to provide enough heat to heat 600–800 square feet of space in residences or other small buildings under reasonably foreseen circumstances.

4. Advertised whole-house heating of one consumer's residence with the use of the Hot Air Collector Kit does not reflect the heating performance that other consumers will obtain under reasonably foreseen circumstances.

5. Few, if any, consumers will save enough money on their home heating bills by using the Hot Air Collector Kit to recoup the retail cost of the Hot Air Collector Kit within an average of 4 years.

6. Solar Age collectors are not the highest BTU-rated collectors, per square foot, in the country.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time of making the representations set forth in Paragraph Five it possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of those representations and each subsequent dissemination, respondent did not possess and rely upon a reasonable basis for making those representations because, *inter alia*, respondent's field data, testimonials and calculations were not designed or conducted in a manner to produce competent, reliable and statistically meaningful results. Therefore, respondent's representations, as set forth in Paragraph Seven were, and are, false and misleading.

PAR. 9. The acts or practices of respondent as alleged in this complaint, and respondent's placement in the hands of its distributors of the means and instrumentalities by and through which others may have used the aforesaid false, misleading and deceptive representations, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A

Exhibit A

Exhibit A

You can start saving today no matter where you live because now there's a solar hot air system [illegible] and simple enough [illegible] install yourself.

Cut your heating bills up to 40%.

Really.

No one has to tell you how expensive it is to heat your home. But with a Solar Age Manufacturing Hot Air Collector Kit you can cut those costs almost in half.

You *can* do-it-yourself.

Our collector kit really is easy to install. There's only 3 moving parts. You just mount it, duct it, and plug it in.

Our collector is cost effective.

Solar Age Manufacturing collectors have been given a higher BTU output rating per square foot than any other in the country. You can expect an efficiency of as much as 34,000 BTU's per day. Enough to heat 600-800 sq. ft!

Safe insulation.

Solar Age Mfg. does not use Polystyrene in its insulation. There's no chance of our system giving off harmful gases.

It's inexpensive.

We know that's a relative statement but once the collector is installed the sunshine is free. Solar Age Mfg. Collector Kits have an average 4 year pay back period. In addition the federal government will pay 40% in tax credits for your new heating system. With individual state credits the percentage could go even higher.

A reputation to maintain.

Solar Age Mfg. is the nation's largest solar air manufacturer. Nationally certified by the Solar Rating & Certification Corporation (SRCC) and the Air Conditioning and Refrigeration Institute (ARI) you can buy confidently knowing your system bears the high standards of industry excellence.

☐ Yes! I've enclosed $4 for all the information on all three Solar Age Mfg. systems. I understand for that I will receive a cassette tape and tax credit information that pertains to my state.

Name _____

Address _____

City _____ State _____ Zip _____

SOLAR AGE MFG. INC.

Send to: Solar Age Manufacturing Inc.
Dept. 300
9001 Central N.E.
Albuquerque, NM 87123

SOLAR AGE MFG. INC.

ARI

SRCC

EXHIBIT B

tachment C

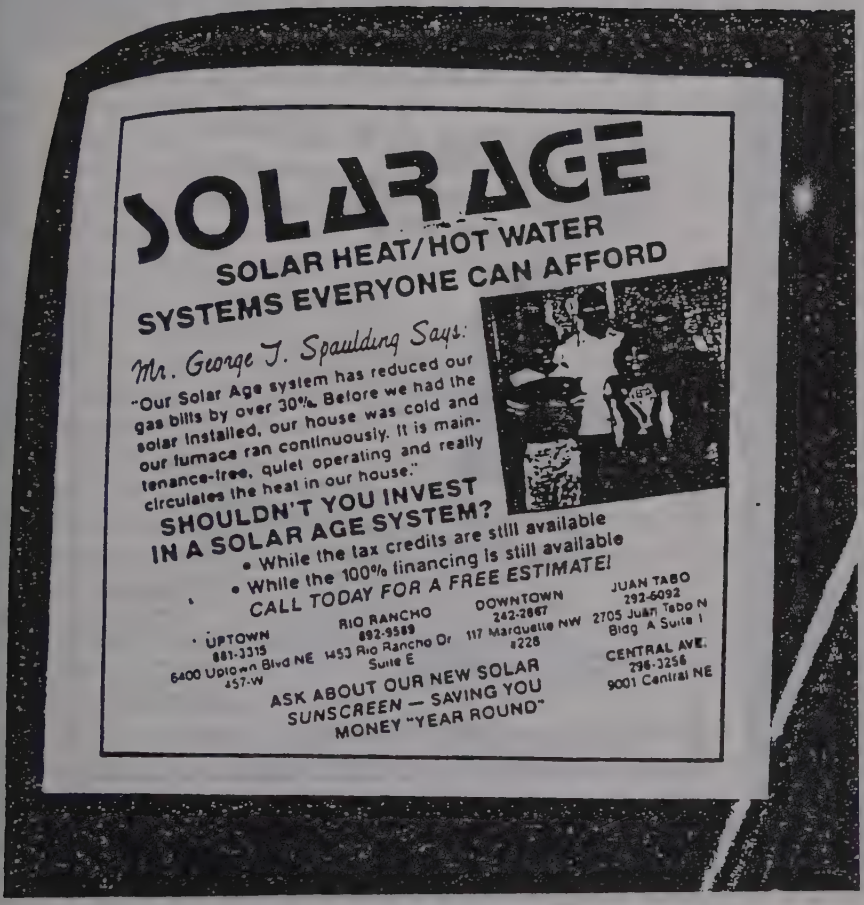
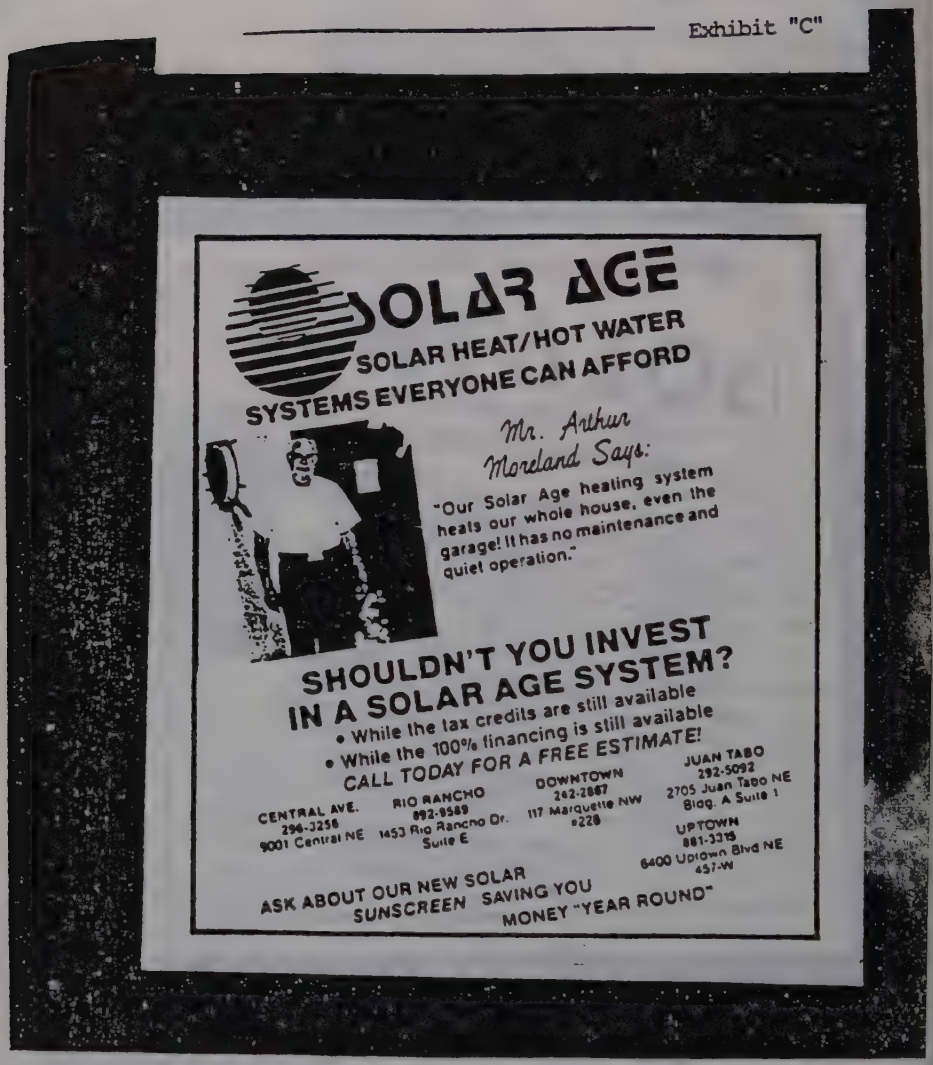


EXHIBIT C

Exhibit "C"



Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Solar Age Industries, Inc., is a corporation with its office and principal place of business located at 6400 Uptown Boulevard, Northeast, Albuquerque, New Mexico.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Definitions

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to energy savings, energy cost savings, area heating capability, efficiency or conservation, "payback," or "payback" potential.

A *competent and reliable test* means any scientific, engineering,

laboratory, or other analytical report, study, or survey prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation and analytical procedures that ensure accurate, reliable and statistically meaningful results.

A *solar space heater* is a particular type of solar energy equipment. Specifically, it is equipment which typically consists of one or more rooftop collector panels, one hot and one cold air duct and a small inlet fan, and which is designed to collect, but not store, the sun's rays for supplemental heating of individual residences or other, small buildings. The term describes, *inter alia,* respondent's "Solar Age Model 37," also referred to by respondent as its "Hot Air Collector Kit."

PART I

It is ordered, That respondent Solar Age Industries, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any solar space heater or any other solar energy equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, in any manner that:

(1) More than a few consumers may be able to reduce their heating bills by 40%, or close to 40%, by using the Hot Air Collector Kit or any other such solar space heater, as defined herein.

(2) Any one consumer's experience with respondent's solar space heater reflects what other consumers will experience under circumstances they can reasonably foresee, unless such is the case.

(3) The Hot Air Collector Kit or any other such solar space heater will provide more than a few consumers enough heat by itself to heat 600–800 square feet of space in residences or small buildings.

(4) More than a few consumers may be able to save enough money on their heating bills by using the Hot Air Collector Kit by itself to recoup the retail cost of the Hot Air Collector Kit or any other such solar space heater which ranges in cost from $1,095 to $3,595, within an average of 4 years.

(5) Its solar collector is the highest Btu-rated solar collector per square foot, in the country, unless such is the case.

B. Making any energy-related claim for any solar space heater, or any other solar energy equipment, unless at the time that the claim

is made, respondent possesses and relies upon a competent and reliable test or other objective material which substantiates the claim.

C. Making any energy-related claim which uses the phrase "up to" or words of similar import unless the maximum level of savings or performance can be achieved by an appreciable number of consumers; and, further, in any instances where consumers could not reasonably foresee the major factors or conditions affecting the maximum level of savings or performance, cease and desist from failing to disclose clearly and prominently the class of consumers who can achieve the maximum level of savings or performance.

D. Misrepresenting, directly or by implication, in any manner, the purpose, content, or conclusion of any test, study, analysis, rating or survey upon which respondent relies as substantiation for any energy-related claim, or making any representation which is inconsistent with the results or conclusions of any such test, study, rating or survey.

PART II

It is further ordered, That respondent Solar Age Industries, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, or distribution of any solar space heater or any other solar energy equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, for at least three years from the date of the last dissemination of energy-related claims, maintain and upon request make available to Federal Trade Commission staff for inspection and copying, copies of:

1. all materials relied upon to substantiate any energy-related claim; and

2. all test reports, studies, surveys or demonstrations in their possession that contradict, qualify, or call into question any energy-related claim.

PART III

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date of service of this order, send the following material via first class mail to every person or firm that is a current distributor of respondent's solar energy equipment and thereafter to every person or firm that becomes a distributor during the first year from the date of service of this order:

1. a copy of this order, and

2. a copy of the cover letter attached to this order as Attachment A, incorporated herein by reference.

B. Distribute a copy of this order to each of respondent's operating divisions, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements or other sales materials.

C. Supply to the Federal Trade Commission upon request the names and addresses of those parties to whom respondent distributed the material required by Paragraphs A and B of Part III of this order.

PART IV

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

ATTACHMENT A

[Solar Age Letterhead]

[Solar Age Distributors]

Re: Advertising Claims and Practices

Dear Solar Age Distributors:

As a result of a Federal Trade Commission investigation of advertising claims for our Solar Age Model 37 Solar Space Heater (the Hot Air Collector Kit), we have entered into the enclosed Consent Order Agreement. The agreement is for settlement purposes only and does not constitute an admission that Solar Age or its distributors have violated the law. At issue in the investigation were a number of energy cost savings, performance and payback claims.

We agree to conform our future advertising practices to the standards set forth in this agreement, and to refrain from the use of all promotional material that may contain contrary claims. In order to insure that such claims will no longer be made, we request that you refrain from making them, either orally or in writing, and to advise your dealers to do so as well. Please forward to us any remaining literature relating to our products which may be in your possession or that of your dealers and which does not conform to the enclosed agreement.

Thank you very much for your assistance in this regard.

Sincerely,
SOLAR AGE INDUSTRIES, INC.

By: _____
Alan D. Schwanke, President

IN THE MATTER OF

AQUANAUTICS CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3207. Complaint, Feb. 17, 1987—Decision, Feb. 17, 1987

This consent order requires, among other things, a San Francisco manufacturer of marine survival suits to notify owners and users of its suits of a safety defect that is potentially life-threatening and send a repair kit to all users and purchasers it can identify to correct the product defect.

Appearances

For the Commission: *Theodore H. Hoppock.*

For the respondents: *Theodore C. Whitehouse, Willkie, Farr & Gallagher,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Aquanautics Corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4560 Horton Street, Building Q, #111, Emeryville, CA.

PAR. 2. Respondent owns and controls a wholly-owned subsidiary, Bremerton Asset Corporation, formerly called Imperial Manufacturing Corporation ("Imperial"). Prior to the sale of part of Imperial's assets on or about March 1985, Imperial was engaged in the manufacturing, advertising, marketing, distributing, and selling to the public of exposure suits—one-piece, hooded, jump suit-like garments made of flexible, buoyant material—which are designed for emergency use to increase the chance of survival in cold water.

PAR. 3. Prior to April 1980, a predecessor to respondent's wholly-owned subsidiary Imperial, called Imperial Manufacturing Company,

manufactured exposure suits equipped with an inflatable bladder called a high rider ring which is intended to be inflated after the exposure suit has been put on by means of an inflator tube glued to the elbow of the high rider ring (hereinafter "the Imperial exposure suit"). In the course and conduct of the business of the predecessor to respondent's wholly-owned subsidiary Imperial, the Imperial exposure suit was offered for sale and sold to purchasers located in various States of the United States and the District of Columbia. Respondent's wholly-owned subsidiary Imperial and its predecessor, at all times mentioned herein, maintained a substantial course of trade in exposure suits in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act, as amended.

PAR. 4. In the further course and conduct of its aforesaid business, respondent's wholly-owned subsidiary Imperial and its predecessor at all times mentioned herein made numerous statements in various advertisements and promotional materials prepared and disseminated for use in selling the Imperial exposure suit. Illustrative and typical, but not inclusive of the statements employed as aforesaid, are the following:

1. Imperial Survival Suits combine the best thermal protection available with indestructable flotation.

2. Our suit gives you the thermal protection and buoyancy needed to stay alive for hours. . . .

3. A revolutionary advancement in life-saving devices, the Imperial Survival Suit gives you the flotation and warmth needed to survive the rigors of the cold, unforgiving ocean.

4. High Rider Ring—A flotation ring that may be attached to the suit for added support to the head and shoulders.

PAR. 5. Respondent's wholly-owned subsidiary Imperial and its predecessor through the use of the aforesaid statements, and by the offering of the Imperial exposure suit for sale by said predecessor of Imperial as a product fit for improving the chance of survival in ocean waters have represented, directly or by implication, that the Imperial exposure suit will consistently and safely provide the necessary flotation and head and shoulder support for the user to float safely in cold ocean water for lengthy periods of time, thereby substantially diminishing the likelihood of drowning.

PAR. 6. In truth and in fact, due to the design of the inflator tube and the high rider ring, the high rider ring on the Imperial exposure suit, which is intended to provide the support of the head and shoulders, would not consistently inflate or remain inflated in actual use. Therefore, the Imperial exposure suit will not consistently and safely provide the necessary flotation and head and shoulder support for the

user to float safely in cold ocean water for lengthy periods of time, thereby substantially diminishing the likelihood of drowning.

Therefore the representation set forth in Paragraph Five was false and misleading.

PAR. 7. The acts and practices of respondent, herein alleged, were all to the prejudice and injury of the public and constituted unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules;

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Aquanautics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Maritime Plaza, Suite 1750, in the City of San Francisco, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For the purpose of this order, the following definitions shall apply:

1. *The Imperial exposure suit* means an exposure suit manufactured by Imperial Manufacturing Corporation before April 1980 for sale in the United States or for use on vessels documented or numbered pursuant to 46 U.S.C. 12101–12122 or on mobile offshore drilling units subject to Coast Guard regulation pursuant to 43 U.S.C. 1333, equipped with an inflatable bladder, called a high rider ring, which includes an inflator tube which is glued, but not clamped, to the elbow of the high rider ring.

2. *Imperial Manufacturing* means the company which manufactured and sold the Imperial exposure suit.

3. *Person* means any individual, partnership, corporation, firm, trust, estate, cooperative, association, or other entity.

4. *Distributor* means any person who purchased or received on consignment the Imperial exposure suit for resale.

5. *Retailer* means any person, other than a distributor, who sold the Imperial exposure suit to the public.

6. *Owner* means any person who purchased the Imperial exposure suit from Imperial Manufacturing, a distributor, or a retailer.

7. *User* means any person who uses or has available for use the Imperial exposure suit irrespective of the ownership of that suit.

8. *Panduit strap* means the plastic strap of the type used to secure the inflator tube to the high rider rings used on exposure suits manufactured by Imperial Manufacturing after April 1980.

9. *The modification contemplated by this order* means the installation of two Panduit straps to reinforce the attachment of the inflator tube to the elbow of the high rider ring and installation of two additional Panduit straps to reinforce the attachment of the inflator nozzle to the inflator tube.

10. *United States* means the fifty states, the District of Columbia and all commonwealths, territories and possessions.

I.

It is ordered, That respondent Aquanautics Corporation, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Imperial exposure suit or any other exposure suit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do

forthwith cease and desist from representing directly or by implication, that any such exposure suit provides the necessary flotation and head and shoulder support for the user to float safely in cold or rough water or diminishes the likelihood of drowning, unless such is the case.

II.

It is further ordered, That respondent do forthwith cease and desist from failing to:

A. Not later than twenty (20) days after the date of service of this order, send, by first-class mail in an envelope clearly marked on the front with the words "Contains Exposure Suit Safety Information And New Safety Straps", to each owner or user of the Imperial exposure suit for whom respondent possesses, controls, or has access to a mailing address the following:

1. A copy of Attachment A(1) to this order. The "Customer Response Card" depicted in Attachment A(1) shall be provided with prepaid postage sufficient to allow it to be mailed first class to the address contained thereon without the need of any additional postage;

2. A sufficient number of Panduit straps to effect the modification contemplated by this order on each of the Imperial exposure suits respondent's records show that the owner or user has;

3. A copy of Attachment B to this order.

B. Respondent shall not be obliged to send the materials listed in subparagraphs 1 through 3 of Paragraph A herein to the owner or user of the Imperial exposure suit if respondent has records which show that:

1. The owner or user of the Imperial exposure suit previously has received the modification contemplated by this order; or

2. The Imperial exposure suit was purchased for use on vessels or structures on which the United States Coast Guard requires the carriage of Coast Guard approved exposure suits pursuant to the following regulations:

a. 46 CFR 33.37;
b. 46 CFR 94.41;
c. 46 CFR 108.513; or
d. 46 CFR 192.41.

C. Not later than twenty (20) days after the service of this order, place and cause to be disseminated the advertisements attached as Attachments E(1) and E(2) to this order in two consecutive issues of

the following publications beginning in the earliest possible issue of each such publication:

1. *National Fisherman;*
2. *The Fisherman's News;*
3. *The Fisherman;*
4. *Alaska Fisherman's Journal;*
5. *The Fish Boat;*
6. *Pacific Fishing;* and
7. *Commercial Fisheries News.*

The first such advertisement in each publication shall be full page in size and be in the form of Attachment E(1); the second shall be one-half page in size and be in the form of Attachment E(1) or Attachment E(2).

D. Not later than (30) days after the service of this order, send, by first-class mail, to each of the approximately 8,000 current holders of "Fisheries Entry Permits" issued by the State of Alaska, at the address shown on the list of holders of such permits available from the State of Alaska, a copy of Attachments A(2) and B to this order and a sufficient number of Panduit straps to effect the modification contemplated by this order on one (1) Imperial exposure suit.

III.

It is further ordered, That:

A. Not later than fifteen (15) days after the date of service of this order, respondent shall contact the following distributors of the Imperial exposure suit and obtain from each distributor, or from the distributor's available records, the names and addresses of all persons, including retailers, to whom the Imperial exposure suit was sold by such distributors to the extent that the distributors have such information:

1. Atlantic Survival Company;
2. King Neptune Company;
3. Nordby Company;
4. Seattle Marine and Fishing Supply Co.;
5. Shelikoff Net Company;
6. Eagle Enterprises, Inc.;
7. Englund Marine Supply Company, Inc.; and
8. Harry's Plumbing and Heating.

B. Not later than fifteen (15) days after the date of service of this order, respondent shall send, by first class mail, to all retailers (a) known to it to have sold the Imperial exposure suit or (b) which

become known to it to have sold the Imperial exposure suit as a consequence of the efforts described in Paragraph III.A, above, the following:

1. A letter in the form of Attachment C(1) to this order;
2. A copy of a display poster, at least 24 inches by 36 inches, with the form and content of Attachment D to this order; and
3. A minimum of sixty (60) Panduit straps which the retailer shall be requested to distribute free of charge to any person who requests them to effect the modification contemplated by this order. Thereafter, respondent shall furnish additional Panduit straps free of charge to any distributor or retailer who requests them for application to the Imperial exposure suit to effect the modification contemplated by this order.

Respondent shall, within forty-five (45) days after the date of service of this order, obtain from each such retailer, or from the available records of each such retailer, the names and addresses of all persons known or reasonably believed to be owners or users of the Imperial exposure suit to the extent that: (a) the retailers have such information and (b) the retailers are willing or able to make such information available to respondents.

C. Not later than thirty (30) days after the service of this order, respondent shall send to each distributor of the Imperial exposure suit from which respondent obtained, pursuant to Paragraph III.A above, (a) the names and addresses of all persons to whom the Imperial exposure suit was sold by that distributor or (b) the response that the distributor had no records of the names and addresses of any owners or users of the Imperial exposure suit, the following:

1. A letter in the form of Attachment C(2) to this order;
2. A copy of a display poster, at least 24 inches by 36 inches, with the form and content of Attachment D to this order; and
3. A minimum of sixty (60) Panduit straps which the distributor shall be requested to distribute free of charge to any person who requests them to effect the modification contemplated by this order. Thereafter, respondent shall furnish additional Panduit straps free of charge to any distributor who requests them for application to the Imperial exposure suit to effect the modification contemplated by this order.

D. Not later than forty-five (45) days after service of this order, respondent shall send, by first class mail, to all distributors and retailers of the Imperial exposure suit, except for those distributors and retailers from which respondent obtained, (a) the names and addresses of all persons known or reasonably believed to be owners or

users of the Imperial exposure suit or (b) the response that the distributor or retailer had no records of the names and addresses of any owners or users of the Imperial exposure suit, the following:

1. A letter in the form of Attachment C(3) to this order;

2. A copy of a display poster, at least 24 inches by 36 inches, with the form and content of Attachment D to this order; and

3. A minimum of sixty (60) Panduit straps which the distributor or retailer shall be requested to distribute free of charge to any person who requests them to effect the modification contemplated by this order. Thereafter, respondent shall furnish additional Panduit straps free of charge to any distributor or retailer who requests them for application to the Imperial exposure suit to effect the modification contemplated by this order.

E. Respondent shall pay, to each retailer or distributor to whom it is required to send Attachment C(3), the sum of ten (10) dollars for each name and address of an owner or user of the Imperial exposure suit such retailer or distributor provides to respondent. Respondent shall pay the ten (10) dollars even if the address provided is not a current address. Said payment must be made within thirty (30) days of respondent's receipt of such names and addresses.

Provided, however, That respondent shall not be required to pay for any name and address provided to it pursuant to this provision if:

1. respondent determines and documents that the named person(s) never owned or used the Imperial exposure suit; or

2. respondent previously had obtained the name and address from any retailer or distributor prior to the date Attachment C(3) was sent to such retailer or distributor; or

3. the name and address is not contained or reflected in the regularly kept business records of such distributor or retailer.

IV.

It is further ordered That:

A. Respondent shall send, by first-class mail, to each person reported to respondent to be or who claims to respondent to be an owner or user of the Imperial exposure suit, within twenty (20) days of respondent's receipt of said report or claim, Attachments A(1) and B and four (4) Panduit straps for each of the Imperial exposure suits reported or claimed to be owned or used by that person.

B. Respondent shall within ten (10) days of the return of any mailing made pursuant to Section II.A, Sections III.B, C, or D, or Section IV.A of this order marked by the Post Office as undeliverable, make

a reasonable search for the current address of the addressee of each returned mailing. For mailings made pursuant to Sections II.A or IV.A, this search shall include the use of the pertinent telephone directory, contacting the relevant ship registries and listings and contacting fishermen's unions.

C. Respondent shall, within ten (10) days of locating a new address through the search required by Section IV.B, send, by first-class mail, the same Attachment(s) and number of Panduit straps sent to the original address to each person for whom a new address is found.

V.

It is further ordered, That:

A. Respondent keep and maintain for three years from the date of service of this order the following records:

1. The names, addresses and dates of mailing of all notices or Panduit straps required by this order;

2. For each contact respondent makes pursuant to the requirements of Section III.A, the name and address of each distributor contacted; the name of the representative or employee of respondent who made the contact; and a record of the response the distributor made to the contact, including, but not limited to, the following information: (a) did the distributor state that it had records of the names and addresses of owners or users of the Imperial exposure suit which it agreed to provide to respondent; (b) did the distributor state that it had records of the names and addresses of owners or users of the Imperial exposure suit which, for any reason, it would not agree to provide to respondent; (c) did the distributor state that it had no records of the names and addresses of owners or users of the Imperial exposure suit; and (d) any other response the distributor made regarding respondent's efforts to obtain from it the names and addresses of owners or users of the Imperial exposure suit;

3. Each response page attached to Attachment C(1) and C(2) of this order returned to respondent by a distributor or retailer of the Imperial exposure suit;

4. The names, addresses, date of receipt and source of the report of all persons reported to respondent to be owners or users of the Imperial exposure suit;

5. The amount of payment, the date of payment and the name and address of the recipient of all payments made pursuant to Section III.E of this order; and

6. The total number of Panduit straps disseminated by respondent pursuant to the provisions of this order.

B. Respondent shall, upon request, make the records specified in Section V.A available to the Federal Trade Commission for inspection and copying.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondent shall, within one hundred twenty (120) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail, the manner and form in which it has complied with this order.

ATTACHMENT A(1)

[COMPANY LETTERHEAD]

URGENT NOTICE Re:
Your Personal Safety

Dear Imperial Survival Suit Owner:

This letter is to inform you of the need to make *immediate modifications* on your Imperial Model 1409 exposure suit equipped with a high rider ring because you may be in danger during an emergency if you use it without modifying it.

The National Transportation Safety Board has concluded that a *serious safety hazard* may exist in Imperial Model 1409 exposure suits equipped with high rider rings manufactured before April 1980.

According to our records, you have purchased an Imperial Model 1409 exposure suit equipped with a high rider ring made between 1975 and April 1980. As part of an agreement we have reached with the Federal Trade Commission, we are sending you this important safety warning and modification kit for your Imperial exposure suit.

We have received reports that the inflator tube assembly, which is used to inflate the high rider ring in these suits, has separated when individuals have attempted to inflate the high rider ring in emergency situations. This separation prevents inflation of the high rider ring, which, when inflated, helps keep the head and shoulders above water.

If the high rider ring cannot be inflated, the exposure suit does not provide you with the added head and shoulder support ("freeboard") intended, and your chance of survival in an emergency situation may be reduced.

We have developed a *free,* simple modification kit to fix this problem and eliminate the safety hazard. We have enclosed this modification kit and the instructions for its use in this mailing. You can complete the modification in just a few minutes time. Once

modified, your Imperial exposure suit will afford you all of the protection intended when it was manufactured. The modification kit meets Coast Guard Standards.

If you should have any additional Model 1409 Imperial exposure suits manufactured prior to April 1980, or know of anyone else who has one, please be sure to fill out and mail the enclosed card. We will send anyone mailing us this card additional *free*, easy-to-use kits for modifying the inflator tube.

Sincerely,

AQUANAUTICS CORPORATION

Enclosures

Customer Response Card

Please send me additional free modification kit(s) for my Imperial Model 1409 exposure suit(s) to the address below.

Name _____

Address _____

_____

# of Kits needed _____

_____

Postage Paid

Aquanautics Corporation
FTC Compliance
4560 Horton Street
Building Q, #111
Emeryville, CA 94608

ATTACHMENT A(2)

[COMPANY LETTERHEAD]

URGENT NOTICE Re:
Your Personal Safety

Dear Fisheries Entry Permit Holder:

This letter is to inform you of the need to make *immediate modifications* on any Imperial Model 1409 exposure suit equipped with a high rider ring in your possession because you may be in danger during an emergency if you use it without modifying it.

The National Transportation Safety Board has concluded that a *serious safety hazard* may exist in Imperial Model 1409 exposure suits equipped with high rider rings manufactured before April 1980. You can determine if an Imperial Model 1409 exposure suit was manufactured before April 1980 by checking the high rider ring. If there are no plastic tie-down straps on the inflator tube, it was manufactured before April 1980 and needs modification.

Because of your occupation, you may have purchased an Imperial Model 1409 exposure suit equipped with a high rider ring made between 1975 and April 1980. As part

of an agreement we have reached with the Federal Trade Commission, we are sending you this important safety warning and modification kit for such an Imperial exposure suit.

We have received reports that the inflator tube assembly, which is used to inflate the high rider ring in these suits, has separated when individuals have attempted to inflate the high rider ring in emergency situations. This separation prevents inflation of the high rider ring, which, when inflated, helps keep the head and shoulders above water.

If the high rider ring cannot be inflated, the exposure suit does not provide you with the added head and shoulder support ("freeboard") intended, and your chance of survival in an emergency situation may be reduced.

We have developed a *free,* simple modification kit to fix this problem and eliminate the safety hazard. We have enclosed this modification kit and the instructions for its use in this mailing. You can complete the modification in just a few minutes time. Once modified, the Imperial exposure suit will afford you all the protection intended when it was manufactured. The modification kit meets Coast Guard standards.

If you should have any additional Model 1409 Imperial exposure suits manufactured prior to April 1980, or know of anyone else who has one, please be sure to fill out and mail the enclosed card. We will send anyone mailing us this card additional *free,* easy-to-use kits for modifying the inflator tube.

Sincerely,

AQUANAUTICS CORPORATION

Enclosures

Customer Response Card

Please send me additional free modification kit(s) for my Imperial Model 1409 exposure suit(s) to the address below.

Name _____

Address _____

_____

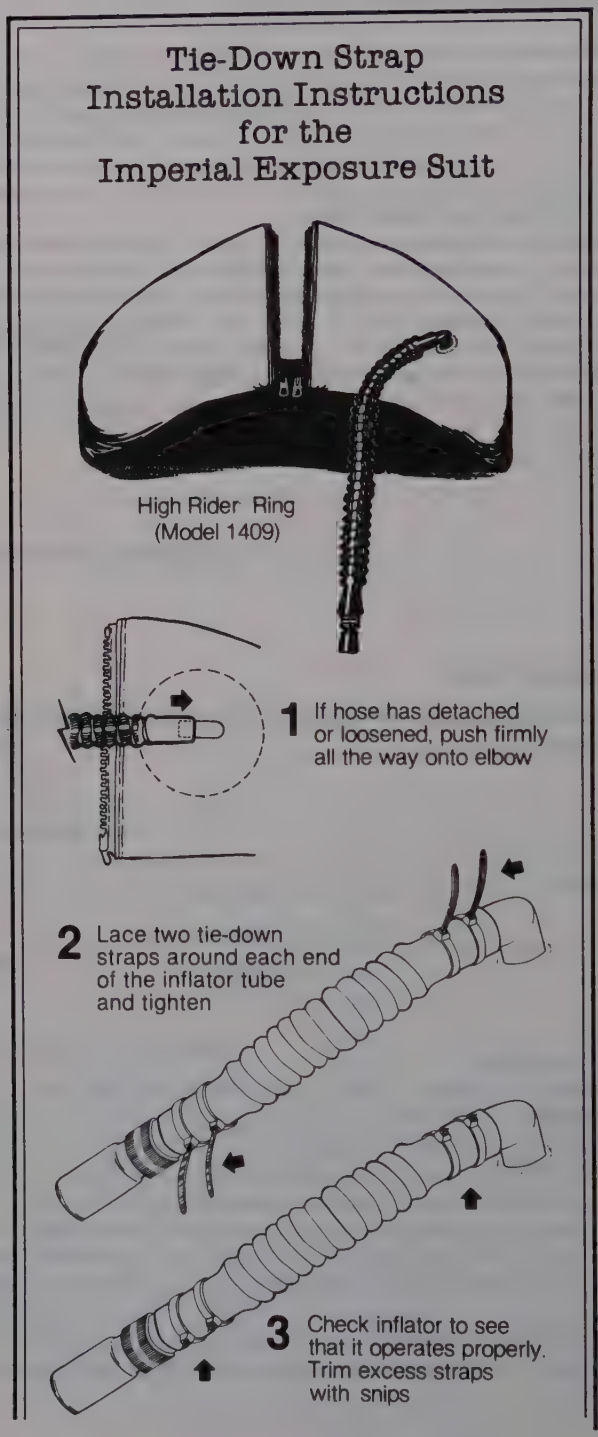
# of Kits needed _____

_____

Postage Paid

Aquanautics Corporation
FTC Compliance
4560 Horton Street
Building Q, #111
Emeryville, CA 94608

ATTACHMENT B



ATTACHMENT C(1)

[COMPANY LETTERHEAD]

URGENT NOTICE Re:
The Safety of Your *Customers*

Dear *(Name of retailer):*

Imperial Manufacturing manufactured and sold an exposure suit equipped with a high rider ring (Model 1409) between 1975 and April 1980. The National Transportation Safety Board has concluded that a *serious safety hazard* may exist in this model exposure suit.

We have received reports that the inflator tube assembly, which is used to inflate the high rider ring in these suits, has separated when individuals have attempted to inflate the high rider ring in emergency situations. This separation prevents inflation of the high rider, which, when inflated, helps keep the head and shoulders above water.

If the high rider ring cannot be inflated, the exposure suit does not provide the added head and shoulder support ("freeboard") intended and may reduce the chance of survival.

We have reached an agreement with the Federal Trade Commission to attempt to 1) notify by mail as many owners and users of Imperial survival suit Model 1409 as we can find of the hazard inherent in their suit and 2) provide them, free of charge, the necessary Panduit (tie-down) straps to eliminate the hazard.

We need your help in locating the names and addresses of purchasers or users of Model 1409 exposure suits equipped with a high rider ring manufactured prior to April 1980. Accordingly, we are making an urgent request that you check your records for, and provide us with, the names and addresses of any purchaser or user of an Imperial Model 1409 exposure suit equipped with a high rider ring manufactured prior to April 1980 sold by your firm. Moreover, if you know the name and address of any other owner or user of these suits, please provide them to us also.

We [have enclosed] or [will be sending] a poster which explains to your customers the hazard and how to get a free modification kit to remedy the hazard. Please put this poster in a highly visible location in your place of business so that your customers may be informed of the hazard and spread the word to their colleagues.

We [have also enclosed] or [will also send] a supply of 60 Panduit straps and instructions for their use. As the instructions explain, the simple installation of four of these straps on the inflator tube assembly of Imperial survival suit Model 1409 will eliminate this safety hazard. Please make these Panduit straps and instructions available free of charge to anyone who owns or uses a Model 1409 exposure suit. If you should need more of these straps, please call Nik Salmela collect at 206–692–5601, and we will rush more to you as quickly as possible.

Please fill out the attached response page and return it to our attention at your earliest convenience. Thank you for your valuable assistance in our effort to eliminate this safety hazard.

Sincerely,

AQUANAUTICS CORPORATION

[company letterhead]

[ADDRESSEE]

PLEASE CHECK THE APPROPRIATE BOXES:

[ ] We do not have records of the owners and users of Imperial Model 1409 Survival Suits equipped with a high rider ring manufactured before April 1980.
[ ] We do have records of the owners and users of Imperial Model 1409 Survival Suits equipped with a high rider ring manufactured before April 1980.
[ ] We will make these names and addressed available to Aquanautics Corporation.
[ ] We will not make these names and addresses available to Aquanautics Corporation.

Signature of authorized agent _____
Title _____ Date _____

ATTACHMENT C(2)

[COMPANY LETTERHEAD]

URGENT NOTICE Re:
The Safety of Your *Customers*

Dear (Name of distributor):

[OPTIONAL INTRODUCTORY PHRASE: As explained in his earlier contact with you], Imperial Manufacturing manufactured and sold an exposure suit equipped with a high rider ring (Model 1409) between 1975 and April 1980. The National Transportation Safety Board has concluded that a *serious safety hazard* may exist in this model exposure suit.

We have received reports that the inflator tube assembly, which is used to inflate the high rider ring in these suits, has separated when individuals have attempted to inflate the high rider ring in emergency situations. This separation prevents inflation of the high rider, which, when inflated, helps keep the head and shoulders above water.

If the high rider ring cannot be inflated, the exposure suit does not provide the added head and shoulder support ("freeboard") intended and may reduce the chance of survival.

We have reached an agreement with the Federal Trade Commission to attempt to 1) notify by mail as many owners and users of Imperial survival suit Model 1409 as we can find of the hazard inherent in their suit and 2) provide them, free of charge, the necessary Panduit (tie-down) straps to eliminate the hazard. You already have assisted us in this effort by providing us with any names and addresses of owners and users of this Imperial Survival suit which you have.

We [have enclosed] or [will be sending] a poster which explains to your customers the hazard and how to get a free modification kit to remedy the hazard. Please put this poster in a highly visible location in your place of business so that your customers may be informed of the hazard and spread the word to their colleagues.

We [have also enclosed] or [will also send] a supply of 60 Panduit straps and instructions for their use. As the instructions explain, the simple installation of four of these straps on the inflator tube assembly of Imperial survival suit Model 1409 will eliminate this safety hazard. Please make these Panduit straps and instructions available free of charge to anyone who owns or uses a Model 1409 exposure suit. If you should need more of these straps, please call Nik Salmela collect at 206–692–5601, and we will rush more to you as quickly as possible.

Please fill out the attached response page and return it to our attention at your

earliest convenience. Thank you for your valuable assistance in our effort to eliminate this safety hazard.

Sincerely,

AQUANAUTICS CORPORATION

[company letterhead]

[ADDRESSEE]

PLEASE CHECK THE APPROPRIATE BOXES:

[ ] We do not have records of the owners and users of Imperial Model 1409 Survival Suits equipped with a high rider ring manufactured before April 1980.
[ ] We do have records of the owners and users of Imperial Model 1409 Survival Suits equipped with a high rider ring manufactured before April 1980.
[ ] We will make these names and addressed available to Aquanautics Corporation.
[ ] We will not make these names and addresses available to Aquanautics Corporation.

Signature of authorized agent _____
Title _____ Date _____

ATTACHMENT C(3)

[COMPANY LETTERHEAD]

URGENT NOTICE Re:
The Safety of Your *Customers*
This is so important that we will *pay* you to help us.

Dear (Name of distributor or retailer):

As we explained in our earlier contact with you, we urgently need your help in locating your customers who purchased an Imperial exposure suit (Model 1409) and we will pay you to help us. *Your efforts might save the life of one of your customers or neighbors.*

Between 1975 and April 1980, Imperial Manufacturing manufactured and sold an exposure suit equipped with a high rider ring (Model 1409). The National Transportation Safety Board has concluded that a *serious safety hazard* may exist in this model exposure suit.

We have received reports that the inflator tube assembly, which is used to inflate the high rider ring in these suits, has separated when individuals have attempted to inflate the high rider ring in emergency situations. This separation prevents inflation of the high rider, which, when inflated, helps keep the head and shoulders above water.

If the high rider ring cannot be inflated, the exposure suit does not provide the added head and shoulder support ("freeboard") intended and may reduce the chance of survival.

We have reached an agreement with the Federal Trade Commission to attempt to 1) notify by mail as many owners and users of Imperial survival suit Model 1409 manufactured prior to April 1980 as we can find of the hazard inherent in their suit and 2) provide them, free of charge, the necessary Panduit (tie-down) straps to eliminate the hazard.

We need your help in locating the names and addresses of purchasers or users of Model

1409 exposure suits equipped with a high rider ring manufactured prior to April 1980. Accordingly, we are making an urgent request that you check your records for, and provide us with, the names and addresses of any purchaser or user of an Imperial Model 1409 exposure suit equipped with a high rider ring manufactured prior to April 1980 sold by your firm. Moreover, if you know the name and address of any other owner or user of these suits, please provide them to us also.

We understand that such a records check is not without cost to you. In an attempt to help defray the cost of searching for and providing us with the requested names and addresses, *we will pay you ten dollars ($10.00) for each name and address of a purchaser or user of an Imperial Model 1409 survival suit you send us.* You will receive your payment even if you do not have the most current address for the purchaser or user. You will receive this payment within 30 days of our receipt of your *bona fide* list of names and addresses.

In addition, we have [enclosed] or [already sent you] a poster which explains to your customers the hazard and how to get a free modification kit to remedy the hazard. Please put this poster in a highly visible location in your place of business so that your customers may be informed of the hazard and spread the word to their colleagues.

We have also [enclosed] or [already sent you] a supply of 60 Panduit straps and instructions for their use. As the instructions explain, the simple installation of four of these straps on the inflator tube assembly of Imperial survival suit Model 1409 will eliminate this safety hazard. Please make these Panduit straps and instructions available free of charge to anyone who owns or uses an Imperial Model 1409 exposure suit equipped with a high rider ring manufactured before April 1980. If you should need more of these straps, please call Nik Salmela collect at 206–692–5601, and we will rush more to you as quickly as possible.

We're counting on you to make your best effort to locate the names and addresses of owners and users of this exposure suit. Thank you for your valuable assistance in our effort to eliminate this safety hazard.

Sincerely,

AQUANAUTICS CORPORATION

ATTACHMENT D

IMPORTANT SAFETY NOTICE

For Imperial Exposure Suit users with High Rider Ring

SAFETY MODIFICATION NEEDED

Ask your Dealer for the FREE Safety Modification Kit

WHO: If you own an Imperial Survival Suit equipped with a High Rider Ring (Model 1409) manufactured before April 1980 - contact your nearest Imperial Dealer immediately.

To determine when your suit was made, look for the manufacturing date stamp inside the back of the neck of the suit. If there is NO date stamp, the suit was manufactured prior to 1981. Then check your High Rider Ring. If there are no plastic tie-down straps on the inflator tube, it was manufactured before April 1980 & needs modification.

WHY: A defect may exist causing the inflator assembly on the High Rider Ring to separate, preventing its proper inflation. Proper inflation of this ring is important because it holds the body in a more upright position - increasing your chance of survival.

The only modification needed is to the High Rider Ring accessory. The suit itself is in no other way affected.

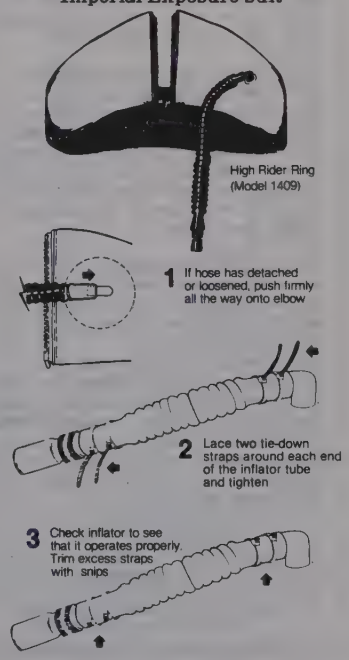
FREE FIX: The modification required is easy and quick. And there's no need to bring in the suit for this modification. Just ask your dealer for the FREE Safety Modification Kit.

This do-it-yourself kit contains four simple-to-install tie-down straps. These will ensure a secure connection to keep the High Rider Ring inflated when in use (see illustrations at right). Though this modification is quick and easy, it's important that it be made for your assured safety. The kit meets Coast Guard standards. If your dealer is out of the kit simply write us for a free kit at:

AQUANAUTICS CORPORATION

One Maritime Plaza, Suite 1750
San Francisco, CA 94111

Tie-Down Strap Installation Instructions for the Imperial Exposure Suit



ATTACHMENT E(1)

IMPORTANT SAFETY NOTICE

For Imperial Exposure Suit users with High Rider Ring

SAFETY MODIFICATION NEEDED

Send or call for a FREE Safety Modification Kit

WHO: If you own an Imperial Survival Suit equipped with a High Rider Ring (Model 1409) manufactured before April 1980-contact Aquanautics Corporation for a FREE safety modification kit.

To determine when your suit was made, look for the manufacturing date stamp inside the back of the neck of the suit. If there is NO date stamp, the suit was manufactured prior to 1981. Then check your High Rider Ring. If there are no plastic tie-down straps on the inflator tube, it was manufactured before April 1980 & needs modification.

WHY: A defect may exist causing the inflator assembly on the High Rider Ring to separate, preventing its proper inflation. Proper inflation of this ring is important because it holds the body in a more upright position - increasing your chance of survival.

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FREE FIX: The modification required is easy and quick. And there's no need to bring in the suit for this modification. We will send you a FREE safety modification kit to correct this problem.

This do-it-yourself kit contains four simple-to-install tie-down straps. These will ensure a secure connection to keep the High Rider Ring inflated when in use (see illustrations at right). Though this modification is quick and easy, it's important that it be made for your assured safety. The kit meets Coast Guard standards.

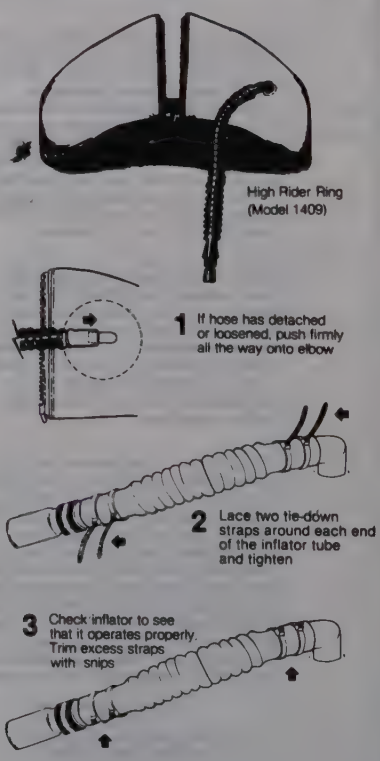
For your FREE modification kit, simply write to:

AQUANAUTICS CORPORATION

One Maritime Plaza, Suite 1750
San Francisco, CA 94111

or call us collect at (415) 658-6629

Tie-Down Strap Installation Instructions for the Imperial Exposure Suit



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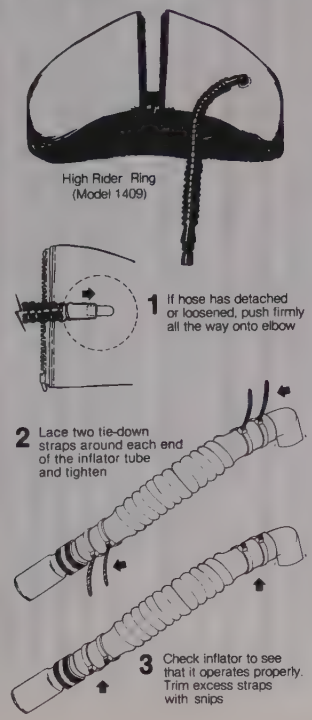

IN THE MATTER OF

J.C. PENNEY COMPANY, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3208. Complaint, Feb. 20, 1987—Decision, Feb. 20, 1987

This consent order prohibits, among other things, a New York City-based retailer from bringing any debt-collection cases in judicial districts other than those in which a customer lives or signed the disputed sales contract. Further, respondent is required to either transfer to a closer court, or dismiss entirely, all pending cases brought in "distant forums."

Appearances

For the Commission: *Rachelle V. Brown.*

For the respondents: *Raymond A. Messina* and *Mallory Duncan,* in-house counsel, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that J. C. Penney Company, Inc., a corporation, ("respondent") has violated Section 5(a) of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. J.C. Penney Company, Inc., is a Delaware corporation, with its principal office and place of business located at 1301 Avenue of the Americas, New York, New York.

PAR. 2. Respondent is a general merchandise and catalog sales retailer, engaged in the advertising, offering for sale, sale, and distribution of clothing, household goods, and various other articles of merchandise.

PAR. 3. The acts and practices of respondent, as alleged in this complaint, have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent regularly extends credit (hereinafter referred to as "consumer credit accounts") for the purpose of facilitating consumers' purchases of respondent's products.

PAR. 5. In the course and conduct of attempting to collect allegedly delinquent consumer credit accounts in Virginia, respondent,

through local attorneys recommended by its collection agencies, regularly sued consumers. In numerous instances, consumers were sued in judicial districts other than where those consumers reside or where they signed the contract sued upon. These suits could have been brought in courts located in the judicial district where defendants reside or where they signed the contracts sued upon. The distance, cost, and inconvenience of defending against such suits effectively deprived many of those defendants of a reasonable opportunity to appear, answer, and defend. Therefore, respondent's use of such distant or inconvenient forums was, and is, unfair.

PAR. 6. The acts and practices of respondent as alleged in this complaint were and are to the prejudice and injury of the public and constituted and now constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. Respondent may continue to employ these acts or practices in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent J.C. Penney Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1301 Avenue of the Americas, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the proposed respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent J.C. Penney Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the collection, or attempted collection, of any consumer credit account, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from bringing or authorizing the bringing of, or proceeding with or authorizing the proceeding with, any action to recover any allegedly delinquent consumer credit account (other than an action to enforce an interest in real property) in any judicial district or similar legal entity that is not the one in which the consumer resides at the commencement of the action or the one in which the consumer signed the contract sued upon (hereinafter "distant forum suit"); *provided, however,* that this paragraph shall not preempt any rule of law that further limits choice of forum or that requires, in actions involving real property or fixtures attached to real property, that suit be brought in a particular county, judicial district, or similar legal entity. For purposes of this order, in open end credit transactions (for example, "revolving charge accounts"), the "contract sued upon" is either the account agreement or the document (commonly called "sales slip" or "purchase order") evidencing the actual credit sale.

II.

It is further ordered, That within thirty (30) days of the date of service of this order, respondent shall terminate or cause to be terminated any distant forum suit which is pending on the date of service of this order; *provided, however,* that, respondent may terminate or cause to be terminated such suit by having the complaint either dismissed or transferred to a judicial district or similar legal entity in

which the consumer resides or signed the contract sued upon, but in the latter instance only if respondent gives the defendant a clear written notice of such action, in substantially the same form as set forth in Appendix A of this order, and the opportunity to defend equivalent to that which defendant would receive if a new suit were being brought.

III.

It is further ordered, That whenever a suit is dismissed pursuant to Paragraph II respondent shall give, within thirty (30) days thereafter, in substantially the same form as set forth in Appendix B, clear, written notice of such dismissal to the defendant to such suit, to each "consumer reporting agency," as that term is defined in the Fair Credit Reporting Act (15 U.S.C. 1681a), that respondent knows or has reason to know has recorded the suit in its files, and to any other person or organization whom the consumer defendant has requested be given it.

IV.

It is further ordered, That respondent shall not be deemed to have violated this order for failure to comply with Paragraph I when such failure directly concerns:

1. a distant forum suit brought on behalf of respondent and reduced to judgment prior to the date of service of this order;

2. a distant forum suit brought in the judicial district or similar legal entity appearing from respondent's business records to be defendant's last known address unless respondent otherwise knows of a more current address;

3. a distant forum suit brought in the name of a third party to recover on a consumer credit account originated by respondent but legally assigned to the third party and with respect to which respondent, prior to the bringing of the distant forum suit, has relinquished, in fact, any and all actual or beneficial ownership and control; or

4. a distant forum suit brought in the name of a third party to recover on a consumer credit account originated by a third party but referred to respondent, prior to default, for collection, provided that the third party, in fact, retains all actual and beneficial ownership and control of the account and of the bringing of the suit.

V.

It is further ordered, That respondent shall maintain and upon request make available to the Federal Trade Commission:

1. Up-to-date documentation of all suits brought during the two (2) year period immediately following the date of service of this order in connection with the collection of any consumer credit account, which documentation shall contain: (a) the name of each defendant; (b) the defendant's address; (c) the judicial district(s) or similar legal entity where the defendant resides and, if relied upon for purposes of suit, the judicial district or similar legal entity where the contract, if any, was signed; (d) the judicial district or similar legal entity where suit was filed; (e) the date filed; (f) the docket number; (g) name of plaintiff (if a collection agency or other entity suing on behalf of respondent); (h) amount claimed; (i) disposition; and (j) an explanation for the choice of forum if the suit was brought in a judicial district other than where the defendant resides or signed the contract sued upon; and

2. A written summary of suits brought in the Commonwealth of Virginia by respondent's collection counsel for the one (1) year period immediately prior to the date of service of this order, with information limited to items (a), (c), (d), and (g) in subparagraph 1 above, and a notation of whether any such suit was terminated pursuant to Paragraph II.

VI.

It is further ordered, That respondent shall distribute a copy of this order to each of its subsidiaries and operating divisions dealing with consumer credit, to each collection agency or counsel with whom respondent currently places its retail credit accounts for collection, and to any other collection agency or counsel prior to referral of respondent's retail credit accounts for collection and shall secure from each such collection agency or counsel a signed and dated statement acknowledging receipt of the order and willingness to comply with it.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the

corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall maintain and upon request make available to the Federal Trade Commission all records that will demonstrate compliance with the requirements of this order including, but not limited to, copies of any notices provided to consumers pursuant to any provision of this order and copies of all statements secured from respondent's collection agencies or counsel acknowledging receipt of this order.

IX.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, signed by the respondent and setting forth in detail the manner and form of its compliance with this order.

Commissioner Azcuenaga was recorded as voting in the negative.

APPENDIX A

Consumer's Name
and address *or,*
if applicable, Consumer's
Attorney's Name and Address

RE: [Case Name and Docket No.]

Dear [Addressee]:

On [ ], J.C. Penney Company, Inc., through its attorney, [attorney's name], filed suit against ["you" or, if applicable "your client, consumer's name"]. The suit was brought in [name of court], [name of county, judicial district or similar legal entity, whichever applicable].

J.C. Penney, Inc., has agreed with the Federal Trade Commission to abide by the Commission's "fair venue standard." That standard provides that if a creditor sues a consumer for a delinquent account, the creditor may sue the consumer only in the judicial district in which the consumer resides at the beginning of the action or signed the contract sued upon.

J.C. Penney, Inc., has also agreed to dismiss or transfer any suit pending on [date of service of order] that was not brought in the proper judicial district under the Commission's standard.

Our records show, that under our agreement with the Federal Trade Commission, we should have brought suit against you [or your client] in [name of applicable county or judicial district] and not in [name of "distant forum"]. For this reason, we are seeking the court's permission to transfer the suit to [name of county or judicial district].

You should receive, from our attorney or the court, copies of all legal papers relating to our request to transfer this suit.

Sincerely,

[J.C. Penney Company, Inc., Signatory]

APPENDIX B

[Addressee's Name and Address]

RE: [Case Name and Docket No.]

Dear [Addressee]:

On [ ], J.C. Penney Company, Inc., caused its suit against [consumer's name] to be dismissed.

Please modify your records to reflect this additional information.

[If applicable: (S)uch suit was refiled on (date) at (place suit filed).]

Sincerely,

[J.C. Penney Company, Inc., Signatory]

cc: [Consumer's Name and Address]

In the Matter of

PHYSICIANS OF MEADVILLE, ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3209. Complaint, March 2, 1987—Decision, March 2, 1987

This consent order prohibits, among other things, 61 doctors in Meadville, Pennsylvania from entering into any agreement to refuse to deal with any physician, group of physicians, or hospital, or from refusing to refer patients, for the purpose of restricting or lessening competition.

Appearances

For the Commission: *L. Barry Costilo, Garry R. Gibbs* and *George R. Bellack.*

For the respondents: *Barbara A. Blackmond, Horty, Springer & Mattern,* Pittsburgh, Pa., for respondent Robert N. Moyers, M.D. *Pro se* for all remaining respondents.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, as amended (Title 15, U.S.C. Section 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondents have violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Paragraph 1. The respondents are physicians practicing in Crawford County, Pennsylvania, in or near the city of Meadville, Pennsylvania. The respondents are engaged in the business of providing health care services to patients for a fee.

Par. 2. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition among themselves or with other physicians.

Par. 3. Respondents constitute approximately eighty percent of all physicians on the active medical staffs at Meadville City Hospital and Spencer Hospital, the two hospitals in the Meadville area.

Par. 4. Respondents' fees are often paid directly or indirectly from outside of Pennsylvania by third-party payors. Respondents purchase and use drugs, supplies, and equipment manufactured outside of

Pennsylvania. Respondents refer patients to physicians located outside of Pennsylvania, and treat patients who are not Pennsylvania residents. Respondents' general business practices, and the conduct described below, affect the interstate flow of funds, the interstate purchase of medical supplies and products, and the interstate movement and billing of patients. Respondents' general business practices, and the acts and practices described below, are in or affect commerce within the meaning of Section 5 (a)(1) of the Federal Trade Commission Act, 15 U.S.C. Section 45 (a)(1).

PAR. 5. Early in 1985, a group of physician specialists on the medical staff of St. Vincent Health Center, an Erie, Pennsylvania, hospital, formulated plans to establish a multispecialty medical office in or near Meadville, approximately 35 miles south of Erie. This group (hereinafter "Erie Group") planned the new office so that members of the Erie Group who already treated patients from Meadville, and areas more distant from Erie, could provide treatment in a location more convenient to those patients, and so that members of the Erie Group could compete more effectively for referrals of patients from Meadville and other nearby areas.

PAR. 6. Since at least April 1985, each of the respondents has combined or conspired with at least some of the other respondents in restraint of trade to prevent or delay the establishment of the Erie Group medical office in the Meadville area.

PAR. 7. In furtherance of the above combination or conspiracy, respondents, among other actions, exerted coercive pressure both directly and indirectly against the Erie Group by jointly threatening to cease referring, or to not refer, patients to Erie Group physicians or any other specialists practicing at St. Vincent Health Center if the Erie Group established a Meadville office. Respondents made this threat by letter dated April 30, 1985 (attached hereto), which was sent to the administrator, members of the Board of Corporators, and members of the medical staff of St. Vincent Health Center, including the members of the Erie Group, and to the President of the Erie County Medical Society. After the threat, the Erie Group suspended its plans to establish a medical office in the Meadville area.

PAR. 8. The purposes or effects or the tendency and capacity of the combination or conspiracy and conduct described in paragraphs six and seven are or have been to restrain trade unreasonably, hinder competition in the provision of health care services in the area of Meadville, Pennsylvania, and deprive consumers of the benefits of competition, in the following ways, among others:

A. The Erie Group has been deterred from providing health care services in the Meadville, Pennsylvania, area, thereby limiting com-

petition among physicians for patients on the basis of price, service, and quality;

B. Other health care providers and provider groups from outside the Meadville area are or may be deterred from establishing offices or facilities that compete with Meadville area physicians;

C. Patients' options in selecting a physician may be limited; and

D. Some patients may be required to travel greater distances, at additional expense and inconvenience, to obtain their preferred health care services.

PAR. 9. The combination or conspiracy and the conduct described above constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45. The violation, or the effects thereof, is continuing and will continue in the absence of the relief requested.

ATTACHMENT

April 30, 1985

We, the undersigned Meadville area physicians, wish to send the following message to the administration, the medical staff, and the board of corporators of Saint Vincent Health Center.

The Meadville area physicians have historically supported both tertiary hospitals in Erie. A group of Saint Vincent specialists now proposes to open an office in Meadville. A distinction has been drawn between this group and the institution itself. We do not recognize the distinction.

We regard this uninvited extension of services as unwarranted and inconsistent with the good will which we have heretofore shown Saint Vincent. Such an action may jeopardize our relationship with all Saint Vincent consultants — not just the satellite specialists.

Signed,

cc: Sister Margaret Ann Hardner, Administrator,
Members of Saint Vincent Medical Staff,
Members of Saint Vincent Board of Corporators,
President, Erie County Medical Society

Page 2.

Signatures continued:

SIGNATURES - PAGE 1.

Azhar Aslam M.D.
Mary B. Hagamen M.D.
Christopher W. Thomas M.D.
Ovunda A. Lawson D.O.
Thomas M. Watson M.D.
Stacey A. Robertson M.D.
W.J. Morris M.D.
A.G. Deininger M.D.
Ronald A. Kellogg M.D.
William K. Petrella D.O.
J.T. Arno M.D.
Robert Moyers M.D.
Randy S. Zelen M.D.
David Dunn M.D.
James H. Larson M.D.
Vernon E. Dean
J. Henry Burkholder M.D.
B. McIntosh M.D.
R.L. Kirkpatrick M.D.
Gerald M. Brooks M.D.
J.B. Nesbitt M.D.
M. Moakeh M.D.
Curt H. Laub M.D.
R.M. Vrablik M.D.
R. J. Bridge M.D.
Tariq Qureshi M.D.
Danilo L. Guanzon M.D.
Lucy Kirchner M.D.
Aiman N. Daghestani
W.T. Holland, Jr. M.D.
Robert A. Driscoll M.D.
Barry B. Bittman M.D.
Joseph G. Piroch M.D.
Fred W. Strickland, Jr. M.D.
T. Downing M.D.
M. Bruce Dratler M.D.
A. O. Hibbard M.D.
S.E. Moutsos M.D.
J.O. Taylor M.D.
W. Sullivan M.D.
Rebecca F. Morris M.D.

SIGNATURES - PAGE 2.

Nicholas J. Fedorka D.M.D.
Lawson C. Smart M.D.
Donald LaVay M.D.
Vic Farrah D.O.
Renato P. Ramirez M.D.
Kwang Choi M.D.
Robert Santora
Robert Concilus M.D.
Luis P. Gomez
Seung C. Lee M.D.
E.J. Owens D.O.
C.T. Cortes, Jr. M.D.
J. Zinnamosca D.O.
D. Saavedra M.D.
David D. Kirkpatrick, Jr. M.D.
V.R. Ordinario, Jr. M.D.
P.T. Poux M.D.
L. Pagniello M.D.
Edward M. Fine M.D.
Mark R. Foster M.D.
James R. McLamb
G. Kwitka M.D.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents are physicians licensed and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with their offices and principal places of business located at the addresses listed in the Appendix attached hereto.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I.

It is ordered, That each respondent, directly or indirectly or through any device, shall cease and desist from entering into, maintaining or continuing, or attempting to enter into, maintain or continue, any agreement or understanding, either express or implied, to refuse to deal with or to withhold patient referrals from any physician, group of physicians, or other health care provider, or to refuse to deal with or to withhold patient admissions from any hospital.

Provided, however, that this Section shall not be construed to prohibit any respondent from participating in hospital medical staff credentialling recommendations, hospital medical staff credentialling decisions in his or her capacity as a hospital board member, hospital

utilization review, hospital peer review, hospital quality assurance, or hospital policy making, where such conduct by the respondent neither constitutes nor is part of any agreement, combination or conspiracy whose purpose, effect or likely effect is to impede competition unreasonably.

II.

It is further ordered, That each respondent shall cease and desist from directly or indirectly, or through any device:

A. For a period of five years following the effective date of this order, making any threat, express or implied, including but not limited to any threat to refuse to deal with or to withhold patient referrals from any physician, group of physicians, or other health care provider, or to refuse to deal with or to withhold patient admissions from any hospital, for the purpose of restricting or lessening competition; or

B. Inducing or attempting to induce any person to refuse to deal with or to withhold patient referrals from any physician, group of physicians, or other health care provider, or to refuse to deal with or to withhold patient admissions from any hospital, for the purpose of restricting or lessening competition.

III.

A. *It is further ordered,* That within thirty (30) days after service of this order, the respondents shall mail a copy of this order and the accompanying complaint to the Administrator, Board of Corporators, and each member of the medical staff of St. Vincent Health Center, Erie, Pennsylvania, and to the President of the Erie County Medical Society.

B. *It is further ordered,* That each respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which the respondent has complied with this order.

C. *It is further ordered,* That each respondent shall promptly notify the Commission of any change in respondent's business address set forth in the Appendix to this order.

APPENDIX

J. Thomas Arno, M.D.: 149 North Main Street, Meadville, Pennsylvania 16335;

Azhar Aslam, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Barry B. Bittman, M.D.: 149 North Main Street, Meadville, Pennsylvania 16335;

Raymond J. Bridge, M.D.: R.D. #2, Box 96, Conneaut Lake, Pennsylvania 16316;

Gerald M. Brooks, M.D.: 403 Euclid Avenue, Saegertown, Pennsylvania 16433;

J. Henry Burkholder, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Kwang Y. Choi, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Candido T. Cortes, Jr., M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Aiman N. Daghestani, M.D.: 773 North Main Street, Meadville, Pennsylvania 16335;

Arthur G. Deininger, M.D.: 390 Park Avenue, Meadville, Pennsylvania 16335;

Timothy Downing, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

M. Bruce Dratler, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Robert A. Driscoll, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

David W. Dunn, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Victor B. Farrah, D.O.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Nicholas J. Fedorka, D.M.D.: 226 Park Avenue, Meadville, Pennsylvania 16335;

Edward M. Fine, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Mark R. Foster, M.D.: 766 Liberty Street, Meadville, Pennsylvania 16335;

Luis C. Gomez, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Danilo L. Guanzon, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Mary B. Hagamen, M.D.: 432 Main Street, Saegertown, Pennsylvania 16433;

Alanson O. Hibbard, M.D.: 838 Park Avenue, Meadville, Pennsylvania 16335;

William T. Holland, Jr., M.D.: 899 Grove Street, Meadville, Pennsylvania 16335;

Ronald A. Kellogg, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Lucille Kirchner, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

David D. Kirkpatrick, Jr., M.D.: 279 Walnut Street, Meadville, Pennsylvania 16335;

Robert L. Kirkpatrick, M.D.: 1058 South Main Street, Meadville, Pennsylvania 16335;

George Kwitka, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

James H. Larson, M.D.: 491 Jackson Park Drive, Meadville, Pennsylvania 16335;

Curtis H. Laub, M.D.: 766 Liberty Street, Meadville, Pennsylvania 16335;

Donald E. LaVay, M.D.: Spencer Hospital, 1034 Grove Street, Meadville, Pennsylvania 16335;

Ovunda A. Lawson, D.O.: 217 North Street, Meadville, Pennsylvania 16335;

Seung C. Lee, M.D.: Spencer Hospital, 1034 Grove Street, Meadville, Pennsylvania 16335;

Brian F. McIntosh, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

James R. McLamb, M.D.: 766 Liberty Street, Meadville, Pennsylvania 16335;

Mohamed Moakeh, M.D.: 773 North Main Street, Meadville, Pennsylvania 16335;

Rebecca F. Morris, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

William J. Morris, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Spero E. Moutsos, M.D.: 370 Chestnut Street, Meadville, Pennsylvania 16335;

Robert N. Moyers, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

John B. Nesbitt, M.D.: 279 Walnut Street, Meadville, Pennsylvania 16335;

Vincente R. Ordinario, Jr., M.D.: Third Street, Conneaut Lake, Pennsylvania 16316;

Edward J. Owens, D.O.: 118 Railroad Street, Cambridge Springs, Pennsylvania 16403;

Lucia Pagniello, M.D.: 508 North Main Street Ext., Meadville, Pennsylvania 16335;

William K. Petrella, D.O.: 823 Chestnut Street, Meadville, Pennsylvania 16335;

Joseph G. Piroch, M.D.: 7 Lakeside Square, Conneaut Lake, Pennsylvania 16316;

Paul T. Poux, M.D.: P.O. Box 127, Guys Mills, Pennsylvania 16327;

Tariq Qureshi, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

Renato P. Ramirez, M.D.: Linesville Medical Center, West Erie Street, Linesville, Pennsylvania 16424;

Stacey A. Robertson, D.O.: 402 Main Street, Saegertown, Pennsylvania 16433;

Diogenes A. Saavedra, M.D.: 664 Highland Avenue, Meadville, Pennsylvania 16335;

Robert A. Santora, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Lawson C. Smart, M.D.: 766 Liberty Street, Meadville, Pennsylvania 16335;

Fred W. Strickland, Jr., M.D.: 495 Pine Street, Meadville, Pennsylvania 16335;

William D. Sullivan, M.D.: Meadville City Hospital, 751 Liberty Street, Meadville, Pennsylvania 16335;

John O. Taylor, M.D.: 843 Park Avenue, Meadville, Pennsylvania 16335;

Christopher W. Thomas, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Ronald M. Vrablik, M.D.: 764 Kennedy Street, Meadville, Pennsylvania 16335;

Thomas M. Watson, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335;

Randy S. Zelen, M.D.: 149 North Main Street, Meadville, Pennsylvania 16335; and

John B. Zinnamosca, M.D.: 505 Poplar Street, Meadville, Pennsylvania 16335.

IN THE MATTER OF

C & D ELECTRONICS, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3212. Complaint, March 6, 1987—Decision, March 6, 1987

This consent order prohibits, among other things, a Jenison, Mich. manufacturer and marketer of cable television decoders from selling or distributing the decoders to any unauthorized purchasers and requires respondents to cease representing that: (1) consumers can lawfully own or use decoders; (2) the use of decoders is legal without authorization from a cable company; or (3) ownership or use of a cable decoder is similar to the ownership or use of a telephone. The consent order also requires respondents to make an affirmative disclosure with the sale of any of their cable television decoders.

Appearances

For the Commission: *Alan E. Krause.*

For the respondents: *G.R. McIneney,* Grand Rapids, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents C&D Electronics, Inc., a corporation, and David Barwacz and Larry Bostelaar, individually and as officers of the corporation, have violated the provisions of Section 5(a) of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and alleges that:

PARAGRAPH 1. Respondent C&D Electronics, Inc., is a Michigan Corporation with its principal place of business located at 2026 Chicago Avenue, Jenison, Michigan 49428.

PAR. 2. Respondent Larry Bostelaar is an individual residing at 7920 Ronson, Jenison, Michigan 49428. He is a stockholder, officer and director of C&D Electronics, Inc. Individually or in concert with others, he formulated, directed and controlled the acts and practices of respondent C&D Electronics, Inc., including the acts and practices alleged in this complaint.

PAR. 3. Respondent David Barwacz is an individual residing at 2532 Northborough Court, NE, Grand Rapids, Michigan 49505. He is a stockholder, officer and director of C&D Electronics, Inc. Individually

or in concert with others, he formulated, directed and controlled the acts and practices of respondent C&D Electronics, Inc., including the acts and practices alleged in this complaint. [2]

PAR. 4. Respondents at the times mentioned in this complaint maintained a substantial course of business, including the acts or practices hereinafter set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents have been engaged in the manufacturing, advertising, distributing and selling of cable television decoders, descramblers, converter-decoders, and converter-descramblers which were capable of decoding or descrambling certain television signals transmitted by cable to subscribers of various cable television systems throughout the United States.

PAR. 6. Cable system operators provide decoders, descramblers, converter-decoders or converter-descramblers to their subscribers as part of the cable delivery system in order to determine and charge for the level of programming service used.

PAR. 7. Cable system operators routinely prohibit subscribers from attaching to their cable system any decoder, descrambler, converter-decoder, or converter-descrambler other than one provided by the cable system operator.

PAR. 8. Cable television decoders, descramblers, converter-decoders and converter-descramblers sold by respondents were designed and have been used to allow the unauthorized viewing of certain signals transmitted by cable television systems operating throughout the United States.

PAR. 9. The sales of respondents' cable television decoders, descramblers, converter-decoders and converter-descramblers have resulted in the loss to cable companies of potential or present cable service subscription revenues. As a result, legitimate cable subscribers pay higher prices for cable service or receive reduced services from the cable companies. In addition, municipalities granting the franchises to provide cable television service receive reduced franchise fees from the cable companies to the detriment of all consumers in the municipalities.

PAR. 10. Respondents' actions as described above have thus caused substantial and ongoing injury that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. [3]

PAR. 11. The acts and practices as herein alleged are to the prejudice and injury of the public and constituted unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Azcuenaga was recorded as dissenting.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and [2]

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent C&D Electronics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 2026 Chicago Avenue, Jenison, Michigan 49428.

Respondents David Barwacz and Larry Bostelaar are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions are applicable:

"*Authorized person(s)*" shall mean any person that is a cable operator or a cable system operator, operating a cable system, as defined

herein, pursuant to a franchise issued by a cable franchising authority, or any person manufacturing or distributing cable television decoders, descramblers converter-decoders, or converter-descramblers pursuant to a contract, agreement, license or other arrangement with a cable operator or a cable system operator to provide, furnish or supply such products to a cable system.

"*Cable operator*" or "*cable system operator*" shall mean any person, partnership, or corporation that provides cable service over a cable system or that, directly or through one or more affiliates, owns a significant interest in any cable system or who otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system. [3]

"*Cable system*" shall mean a facility or combination of facilities, constructed or operated pursuant to a franchise, that consists of a set of closed transmission paths and associated signal generation, reception and control equipment and that is designed to provide cable service to multiple subscribers within a community or a satellite master antenna system (SMATV), that serves subscribers in one or more multiple unit dwellings under common ownership, control or management.

"*Franchise*" shall mean an initial authorization or renewal thereof, issued by a franchising authority, whether designated as a franchise, permit, license, resolution, contract, certificate, agreement or otherwise, which authorizes the construction or operation of facilities designed to provide cable service.

"*Franchising authority*" shall mean any state, political subdivision, or agency thereof, or any governmental entity empowered by Federal, State or local law to grant a franchise.

I.

It is ordered, That respondents C&D Electronics, Inc., a corporation, its successors and assigns, and its officers, and David Barwacz and Larry Bostelaar, individually and as officers of the corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any cable television decoder, descrambler, converter-decoder or converter-descrambler that may be used for the decoding, descrambling, and/or intercepting in any manner whatsoever of all or any part of any cable television transmission do forthwith cease and desist from selling or distributing, any such product to any person that is not an authorized person hereunder.

II.

It is further ordered, That respondents C&D Electronics, Inc., its successors and assigns, and its officers, and David Barwacz and Larry Bostelaar, individually and as officers of the corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, [4] division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any cable television decoder, descrambler, converter-decoder or converter-descrambler that may be used for the decoding, descrambling, and/or intercepting in any manner whatsoever of all or any part of any cable television transmission, do forthwith cease and desist from representing, directly or by implication that:

1. Any consumer may lawfully own or use such a product.
2. The ownership and use of any such product is the same as or similar to the ownership or use of telephone equipment.
3. Any consumer may lawfully use any such product without first obtaining authorization from a cable company and paying the required fees.

III.

It is further ordered, That respondents shall, for a period of five years after the date this order becomes final, maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All sales invoices showing sales of any cable television decoder, descrambler, converter-decoder or converter-descrambler with the invoices showing the name of the person or persons, to whom the sale was made, along with their address(es) and the quantity of such products sold to such person(s).
2. Documents verifying that for each such sale the buyer was an authorized person hereunder. [5]

IV.

It is further ordered, That respondents shall, in connection with the sale of any cable television decoder, descrambler, converter-decoder or converter-descrambler that may be used for the decoding, descrambling, and/or intercepting in any manner whatsoever of all or any

part of any cable television transmission, disclose clearly and conspicuously in writing to the buyer the following statement:

"The possession and use of cable TV equipment on any cable TV system without specific authorization from a cable company and the payment of required fees is strictly prohibited in most states. C&D sells its products only to authorized persons."

V.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of its agents, representatives and employees having advertising, marketing, sales or corporate policy responsibilities with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of a copy of the order.

VI.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents David Barwacz and Larry Bostelaar shall, for a period of five (5) years after the date of service of this order, notify the Commission of the discontinuance of their present employment and of their affiliation with any new business or employment, involving the manufacture, advertising, sale, offering for sale or [6] distribution in commerce of any cable television equipment or accessories, or of their affiliation with any new business or employment in which their duties or responsibilities would involve the manufacture, advertising, sale, offering for sale or distribution of cable television equipment or accessories, with each such notice to include respondent's new business address and a statement as to the nature of the new business or employment, as well as a description of their duties and responsibilities.

VIII.

It is further ordered, That respondents, within sixty (60) days from the date of service of this order, shall file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I dissent from the Commission's decision to accept the consent agreement with C&D Electronics and its principals. Although this case may technically meet the criteria for application of an unfairness theory under Section 5 of the FTC Act, it is different from the usual case in which the Commission seeks to halt some form of seller behavior that creates or unfairly takes advantage of obstacles to fully informed decisions by consumers.

In this case, the product is a decoder, a device for obtaining access to cable programming. C&D allegedly acted unfairly by selling decoders to consumers who used them to obtain cable programming without paying for it, resulting in lost revenues for cable companies, higher cable prices for consumers and reduced franchise fees for municipalities. The order attempts to deal with the alleged unfairness by prohibiting C&D from selling decoders to unauthorized users.

The alleged injury, however, stems not from any overreaching by C&D but rather from the voluntary use of pirate decoders by consumers. What the order is really trying to stop—or, given C&D's size relative to the rest of the industry, to inhibit to some degree—is not the unlawful behavior of the seller of the product but rather the unlawful behavior of the consumers who purchase the product. This may be a laudable goal, but it is not the sort of accomplishment this agency was set up to achieve. By accepting this order, the Commission embarks on a course of social engineering that brings a radical new meaning to the concept of consumer protection.

No doubt consumers engage in a good deal of behavior, lawful or unlawful, that is costly to society. Some consumers litter our parks and highways, but the expense of cleaning up is not a basis for action by the Commission to restrict the sale of soft drink bottles and fast foods. Although federal or state lawmakers properly may attempt to restrict such behavior, I know of no mandate for the Federal Trade Commission to regulate undesirable behavior of individual citizens not involved in trade.

To address the problem of unauthorized cable TV decoders, Congress enacted the Cable Communications Policy Act of 1984, 47 U.S.C. Section 553, which exposes the users and sellers of pirate decoders to

substantial criminal penalties and civil liability. A number of state law restrictions also exist. In addition, the cable industry is developing technology to block pirate decoders. It seems to me that this agency should use its increasingly scarce resources to monitor unfair methods of competition and unfair or deceptive acts and practices by those who are engaged in trade and should leave the policing of the unauthorized use of decoders by consumers to the cable industry and to the Department of Justice.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

After extensive consideration and reflection I have concluded that the consent agreement in this matter should be provisionally accepted. This case fits the analytic framework that we have established for our "unfairness" jurisdiction, and the facts present justify Commission action. There is reason to believe that the practices of C&D Electronics have resulted in substantial consumer injury that is not offset by any legitimate countervailing benefits to consumers or competition and that the resultant consumer injury was not reasonably avoidable.[1]

CONSUMER INJURY

The cost of stolen cable services is initially borne by the cable companies, the premium cable services, and the municipalities that grant cable franchises. There is little doubt, however, that most or all of those costs are passed along to honest cable service subscribers in the form of higher prices.

Such activities can result in actual and substantial consumer injury, far greater than that challenged in many of our other cases. In many of our deception and competition cases, for example, we rely in large part on presumptions about the likely adverse effects on consumers. And like our other competition and [2] consumer protection actions, this injury takes place in the context of a commercial transaction.

Moreover, consumer injury can provide a basis for Commission action even when there is no direct contact between the respondent and the ultimate consumer. Our concerns in halting conduct that results in unjustified harm to the public is not limited to injury incurred by the direct purchasers of products. An example of this is the Commission's consent agreement in *Phillip Morris, Inc.*, 82 FTC 16

[1] I am wholly unable to fathom concerns that we are engaging in some form of social engineering by accepting this consent agreement. In this case there is no attempt to substitute our views for those of an informed public. Congress, it should be noted, has already passed legislation prohibiting the type of conduct alleged here.

(1973), where the company had distributed free samples of razor blades that the Commission alleged were a safety hazard because they could come into the hands of small children or injure others who had not purchased a product.

The consumer injury at issue here is similar to that in our competition cases, where our purpose is ultimately to prevent restraints on trade that would result in consumer injury in the form of increased prices. In *FTC v. Indiana Federation of Dentists,* 106 S.Ct. 2009 (1986) the Court found that the concerted action taken by the dentists was:

> likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.

Id. at 2019. Such price increases injure consumers who cease purchasing or turn to a less satisfactory substitute (i.e., who then have no direct contact with the respondent) as well as those who continue to purchase at higher prices. The injury alleged [3] here is more direct than in many of those cases, and I am aware of no compelling reason for treating the situations differently.

In addition, in a case of this sort injury to consumers may go well beyond a simple increase in prices; the activity here may provide disincentives that will result in services not being available to consumers at all. There is little or no reason for businesses to establish cable services, or expand and improve existing ones, unless sufficient revenue can be generated to warrant expenditures. Widespread or unchecked free riding could discourage ventures that would offer such services or could result in raising the prices for cable subscriptions in existing networks beyond optimal levels. Thus such action could not only result in present injury, but also could undermine the competitive process that encourages innovation or maintenance of such facilities and thereby increase the risks of collateral consumer injury of a different type.

COUNTERVAILING BENEFITS TO CONSUMERS OR COMPETITION

I am unable to identify any collateral benefits to consumers or competition that are likely to offset the conduct alleged here. Significant free riding on services paid for by others can hardly be considered a benefit that offsets the resultant costs imposed on honest cable subscribers. [4]

AVOIDABILITY OF THE INJURY

This aspect of our unfairness jurisdiction involves an inquiry into whether market forces provide an adequate disincentive for conduct injurious to consumers.[2] In many of our cases there is a defect in the information available to consumers in making purchase decisions that they cannot easily protect themselves from.[3]

However, we have also recognized that unfairness may be involved in situations where there is no informational problem—for example, where a clearly defined right cannot be enforced effectively by private actions.[4] In my view, it was this rationale that supported our finding of liability in *Orkin Exterminating,* Docket 9176, (December 15, 1986). In that case, like this one, there was a firmly established (and rational) **[5]** legal standard governing the conduct, the consumer injury alleged was substantial and readily identifiable, and the injury resulted from commercial transactions within our jurisdiction and expertise.[5]

Private actions may not be able to deter the type of conduct that C&D Electronics was charged with engaging in. First, most cable companies and municipalities do not have the technology to detect the use of these sorts of decoders, and thus have a difficult time determining the scope of the problem and the source of illegal decoder use.[6] Thus most municipalities, even though deprived of revenue, have little incentive to take action. Cable companies are faced with the same difficulties. Moreover, they may have little incentive to fund litigation which will benefit competitors as much as, or perhaps more, than themselves. Even where a problem is identified and litigation ensues, the relief obtained frequently extends only to the geographic area of the complaining party. Neither trade associations nor the premium services themselves have mounted efforts to curtail such activities. As a result I believe that the consumer injury alleged to result from the actions of C&D Electronics is not reasonably avoidable. **[6]**

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[2] The need for this inquiry is made explicit in the Commission's Policy Statement on Unfairness, and is incorporated into the analysis of whether injury is reasonably avoidable:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market.

Unfairness Statement at 7.

[3] *Id.* "[W]e rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention . . . ."

[4] "In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue." Unfairness Statement, n.19 at 7.

[5] These considerations demonstrate why there is no role for the Commission in matters such as pollution or gun control.

[6] Even if the technology to circumvent use of illicit decoders were available, however, the cost of implementing safeguards of that type would probably be imposed on consumers as well.

CONCLUSION

Accepting this consent decree does not, to my mind, signal a broad foray into Commission enforcement of all property rights. In fact, I would suspect that situations like the one present here will come to our attention infrequently. When we do find substantial consumer injury in such situations, it is important that the conduct satisfy our criteria on unfairness, and it is particularly necessary that we be able to determine whether private actions are adequate to vindicate private rights. This process must, of necessity, result from case-by-case analysis based on the particular facts involved. I am satisfied that the consent agreement negotiated in this matter satisfies those standards, and I am therefore voting to accept it provisionally.

IN THE MATTER OF

ALLIED CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C–3109. Consent Order, May 17, 1983—Modifying Order, Mar. 18, 1987

The Federal Trade Commission has modified a 1983 consent order (101 F.T.C. 721) by requiring that, until 1993 and with certain exceptions, the successors to Allied must obtain prior FTC approval before acquiring any interests or assets of a high-purity acid maker.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On July 29, 1986, Allied Corporation ("Allied") filed a document entitled "Petition By Allied Corporation Pursuant to Section 5(b) of the FTCA and Rule 2.51 To Reopen and Terminate Paragraph III of the Consent Order Entered in Docket No. C–3109." The petition requests that the Commission reopen the order and terminate Paragraphs III and IV. In the alternative, Allied requests that the Commission relieve Allied of its compliance obligations under those paragraphs. Paragraph III prohibits Allied from acquiring for ten years without prior Commission approval "any assets of or any stock interest in any company engaged in the manufacture of high-purity acid in the United States * * *." Paragraph IV requires Allied to file annual reports respecting its compliance with Paragraph III. The preamble to the order defines "respondent" to mean "Allied Corporation, its subsidiaries, affiliates, divisions, successors, and assigns."

On September 19, 1985, Allied merged with The Signal Companies, Inc. ("Signal"). They formed a new parent corporation, Allied Signal Inc. ("Allied Signal"), with Allied becoming a wholly owned subsidiary of Allied-Signal. In December 1985, Allied-Signal restructured itself by forming a new corporation containing thirty-five former businesses of Allied or Signal. The new corporation was named The Henley Group, Inc. and included the entire high-purity acid business of Allied. On May 28, 1986, Allied-Signal spun-off Henley. Seventy percent of the equity of Henley was distributed to the shareholders of Allied-Signal as a stock dividend ("Distribution"). The remaining thirty percent was retained by Allied-Signal. The formation agreement between Allied-Signal and Henley dated February 26, 1986, included a schedule of enumerated liabilities which stated that Henley may be liable for the Commission's order in this matter. On Janu-

ary 28, 1987, Allied-Signal sold nearly all of its remaining Henley stock to Henley.

Allied requests that the Commission terminate Paragraphs III and IV on the basis of changed conditions of fact and the public interest. In the alternative, it requests that Allied be relieved of its obligations under those paragraphs. Allied states that Allied-Signal has divested itself of all of the businesses and assets that gave rise to the order and, therefore, there are no longer competitive concerns that would justify the need for prior Commission approval for any acquisition that Allied may wish to make of a high-purity acid business.

After reviewing Allied's petition and other information, including a December 18, 1986 letter from Henley, the Commission has concluded that termination of Paragraphs III and IV is not warranted. The creation of Henley and transfer to it of Allied's high-purity acid business is not a changed condition of fact warranting such action. The business appears to be continuing in an essentially identical form, and there is consequently reason to believe that Henley may be a successor to Allied for purposes of the order. *See Golden State Bottling Co., Inc. v. NLRB,* 414 U.S. 168, 171 n.2, 181, 182 n.5 (1973).

In view of the foregoing, the Commission has concluded that changed conditions of fact and the public interest warrant a modification to the order relieving Allied of its compliance obligations under Paragraphs III and IV. Allied is no longer engaged in the manufacture and sale of high-purity acids as a result of the transfer of that business to Henley. Furthermore, Allied states that it does not intend now to reenter the market.

Accordingly, it is hereby ordered that the proceeding be, and it hereby is, reopened and the order modified to relieve Allied of its compliance obligations under Paragraphs III and IV.

IN THE MATTER OF

RELIANCE WOOD PRESERVING, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC.5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C–3210. Complaint, April 2, 1987—Decision, April 2, 1987

This consent order prohibits, among other things, the Federalsburg, MD manufacturer of flame-retardant, pressure-treated wood from misrepresenting the flame-retardant value of its products and requires respondents to notify purchasers that some of the wood may not meet established safety standards.

Appearances

For the Commission: *Charles Peterson* and *Truett M. Honeycutt.*

For the respondents: *Starke Evans,* Federalsburg, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Reliance Wood Preserving, Inc., a corporation, McCoy Industries, Inc., a corporation, Reliance Treated Wood, Inc., a corporation, and Daniel Roy Dorman, individually and as an officer of Reliance Wood Preserving, Inc., ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Reliance Wood Preserving, Inc. (Reliance), is a Maryland corporation with its office and principal place of business located in the Federalsburg Industrial Park, P.O. Box 349, Federalsburg, Maryland 21632. Respondent Reliance manufactures, advertises, and sells fire retardant treated wood (FRTW).

(b) Respondent Daniel Roy Dorman (Dorman) resides in the State of Maryland. He is president of respondent Reliance; he directs, controls, formulates, or participates in the acts and practices of respondent Reliance.

(c) Respondent Reliance Treated Wood, Inc. (Treated Wood), is a North Carolina corporation with its office located at 300 East Wendover Avenue, Greensboro, North Carolina 27420 and its principal place of business located at Federalsburg Office Park, Federalsburg, Maryland. Respondent Treated Wood advertises and sells FRTW.

(d) Respondent McCoy Industries, Inc. (McCoy), is a North Carolina

corporation with its office and principal place of business located at 300 East Wendover Avenue, Greensboro, North Carolina 27420. McCoy owns 100% of the outstanding stock of respondent Treated Wood.

DEFINTIONS

PAR. 2. For the purposes of this Complaint, the following definitions apply:

a. *"ASTM E 84"* is a test recognized in the lumber industry as a measure of the fire retardancy of wood based on the rate of flame spread.

b. An *"ASTM E 84 flame spread index"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

c. *"Fire Retardant Treated Wood"* or *"FRTW"* is wood that has an ASTM flame spread index of 25 or less and is chemically treated under pressure with fire retardant chemicals.

d. *"Respondents' FRTW"* means wood that Reliance has represented or Treated Wood has advertised as being fire retardant or class "A" or having a flame spread of 25 or less.

e. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

f. *"Flameguard"* is a brand name that respondents use for their FRTW.

g. *"Underwriters Laboratories"* (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

h. *"The American Wood Preservers Bureau"* is an industry association concerned with the quality of wood.

i. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

PAR. 3. The acts and practices of respondents alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

PAR. 4. The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 5. Respondents Reliance and Dorman have placed labels on respondents' FRTW that read as follows:

a. FLAMEGUARD
ASTM-E 84 25 OR LESS
MEA 140–83 M
Exterior

b. 83 FLAMEGUARD 84
Fire Retardant Treated Wood
ASTM-E 84 25 OR LESS
Reliance Wood Preserving, Inc.,
Federalsburg, Maryland
Quality assured by Timber Products Inspection

PAR. 6. Through the use of the labels on respondents' FRTW described in paragraph five above, respondents Reliance and Dorman have made the following material representations, directly or by implication:

(1) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, has a flame spread index of 25 or less as measured by the ASTM E 84 test.

(2) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, is quality assured or otherwise approved by Timber Products Inspection.

PAR. 7: In truth and in fact:

(1) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, does not have a flame spread index of 25 or less.

(2) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection.

Therefore, the representations set forth in paragraph six were and are false and misleading.

COUNT II

PAR. 8. The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 9. Respondent Treated Wood advertises FRTW through promotional flyers and brochures. In such advertisements, Treated Wood

has made various statements, prior to April 15, 1985, concerning the fire retardant properties and the quality classifications, approvals, or certifications of respondents' FRTW. Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit A:

a. "Flameguard has a low flame spread index of 25 or less";
b. "Flameguard is UL classified";
c. "All tests have been conducted and certified by the TPI Agency, Conyers, Georgia"; and
d. "All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance Flameguard to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials (ASTM-E 84 . . .). . . ."

PAR. 10. Typical and illustrative of the statements made by Treated Wood, prior to April 15, 1985, concerning respondents' FRTW, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit B:

a. "Flameguard Underwriters Laboratories tested and certified";
b. "Fire retardant";
c. "Class 'A' rating";
d. A depiction of Timber Products Inspection's logo; and
e. A depiction of the American Wood Preservers Bureau's logo.

PAR. 11. Through the use of the statements contained in paragraphs nine and ten above and other statements not specifically set forth herein, Treated Wood has made the following material representations, directly or by implication:

(1) Respondents' FRTW has a flame spread index of 25 or less.
(2) Respondents' FRTW possesses a class "A" rating.
(3) UL classifies or otherwise approves respondents' FRTW.
(4) Timber Products Inspection assures the quality of or otherwise approves respondents' FRTW.
(5) American Wood Preservers Bureau approves or certified respondents' FRTW for fire retardancy.

PAR. 12. In truth and in fact:

(1) At least some of respondents' FRTW, which was sold prior to April 15, 1985, has a flame spread index higher than 25.
(2) At least some of respondents' FRTW, which was sold prior to April 15, 1985, does not possess a class "A" rating.
(3) UL has not classified or otherwise approved respondents' FRTW.

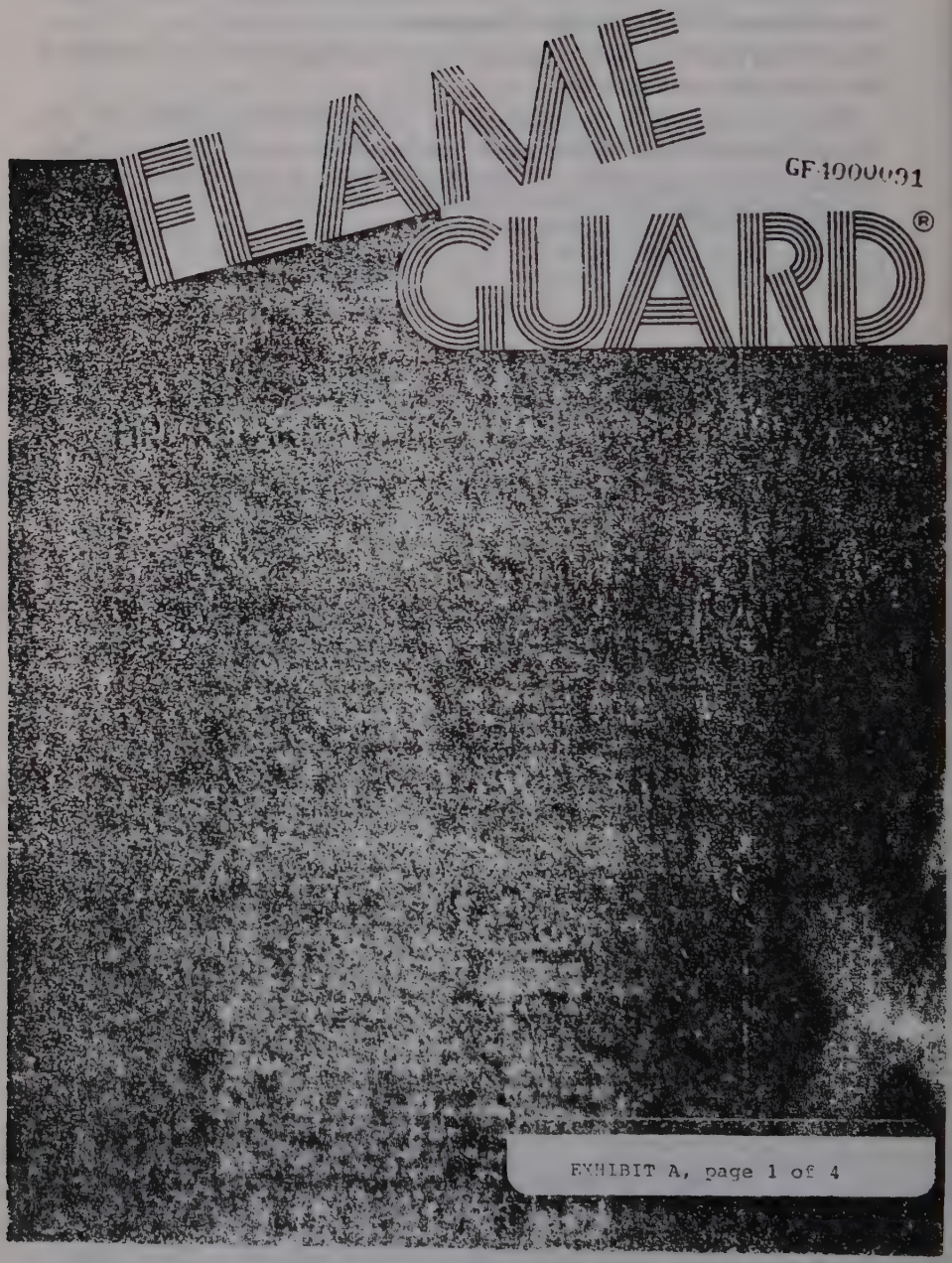
(4) At least some of respondents' FRTW, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection.

(5) American Wood Preservers Bureau has not approved or certified respondents' FRTW for fire retardancy.

Therefore, the representations set forth in paragraph eleven were and are false and misleading.

PAR. 13. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A

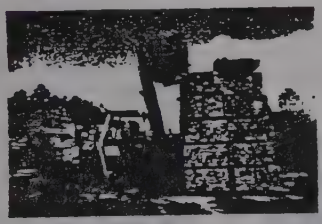


RELIANCE®

FLAMEGUARD® FIRE-RETARDANT TREATED WOOD HAS MANY USES.

FLAMEGUARD® pressure-treated wood products can be used both for interior or exterior construction where safety from fire is mandatory. Flameguard fire-retardant wood is ideal for roof and floor trusses, beams, roofdecks, trim, loadbearing and non-bearing partitions, steps, stairways, ladders, scaffolding, siding, framing, balconies, walkways and facades or any other application that requires fire-resistant and noncombustible building materials.

As Flameguard treated wood remains clear and will not develop the unsightly surface bloom common with many other fire retardant treatments, Flameguard products are particularly suited to architectural millwork, moldings, and paneling.



ADVANTAGES

FLAMEGUARD is a special formulation of fire retardant chemicals pressure impregnated for maximum wood penetration and protection.

FLAMEGUARD has a low flame spread rating of 25 or less and generates low smoke levels. Its self-extinguishing characteristic eliminates wood so treated as a source of fuel thereby limiting the spread of fire.

FLAMEGUARD fire-retardant treated wood retains its strength under fire conditions longer than untreated wood and many other building materials including steel.

FLAMEGUARD has a very low hygroscopicity and does not absorb and retain moisture even in high humidities. Use in humidities up to 95% is recommended.

FLAMEGUARD is compatible with metal fasteners. Unlike the sulphate and chloride contained in many fire-retardant treatments, the chemicals in our process are non-corrosive.

FLAMEGUARD is a clear fire-retardant treatment which causes little, if any, change in the original color of the wood. Unlike wood treated with other fire-retardant processes, Flameguard products are free of chemical deposits and have no unsightly residue to mar the surface of the wood.

GF-1000092

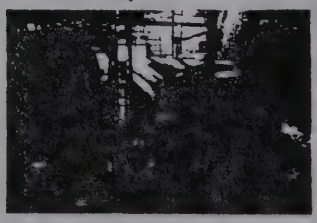
FLAMEGUARD is non-blooming even in extremely humid conditions. Like untreated wood, Flameguard treated wood will weather naturally.

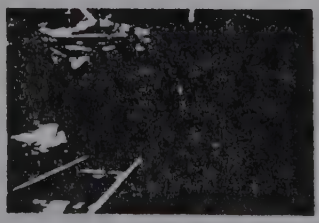
FLAMEGUARD treated wood does not require sealing. The surface of the treated wood will remain clean and can be left unfinished, stained or painted with oil based products

FLAMEGUARD fire-retardant treated wood qualifies for lower insurance rates with major rating organizations. In many states buildings constructed with fire-retardant treated lumber is granted the same rating as masonry construction and is classified similar to noncombustible material. Shingles treated with Fireguard carry a B rating without foil being placed under them.

FLAMEGUARD is halogen free and is acceptable for construction of nuclear power plants. Free formaldehyde is not given off by Flameguard treated wood

FLAMEGUARD treated wood, although not marketed as preservative-treated products, does give protection from decay since the wood is sealed and the chemicals are toxic to insects.





FLAMEGUARD is injected through a pressure treatment that forces the fire-retardant chemicals into wood without injuring the wood fibers. The process is operated on a time-pressure schedule that equalizes the natural differences present in lumber and plywood.

FLAMEGUARD reduces the splitting and checking characteristics of untreated wood.

FLAMEGUARD treated wood is readily available with substantial inventories of treated wood products and an abundant supply of raw materials.

EXHIBIT A, page 3 of

SPECIFICATIONS

All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance® Flameguard® to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials (ASTM E-84, NFPA 255, AWPA C-20 and C-27). U.L. 723.

GF-100

Each treated product will be tested and will bear the performance identification label assuring its compliance with the standards of the American Wood Preservers Association.

Shingles and shakes will be fire-retardant pressure treated to meet the requirements for a Class B or Class C covering in accordance with the Standard Test, ASTM E-108 Test for Roof Covering Materials.

STANDARDS AND APPROVALS

Flameguard® meets the requirements of the following specifying agencies: Federal Specification MIL-L-19140C; Building Officials and Code Administrators International; International Conference of Building Officials, Southern Building Code Congress International, Inc.; National Fire Protection Association, Inc.; American Wood Preservers Association; National Building Code, Insurance Services Office, Nuclear Energy Liability Property Insurance Association and many other local, county and state building codes, insurance underwriters and rating bureaus.

All tests have been conducted and certified by The T.P.I. Agency, Conyers, Georgia.

Flameguard is U.L. Classified (U.L. 723).

Flameguard® treated lumber and plywood is a product of Reliance® Treated Wood. For additional information or to place orders contact one of our offices:

RELIANCE®
TREATED WOOD

P.O. Box 22101
Greensboro, NC 27420
919/379-0801
Outside North Carolina 800/334-9113

P.O. Box 400
Federalsburg, MD 21632
301/754-5711

P.O. Box 203
Newtown Square, PA 19073
215/353-6466

GF-100008.1

EXHIBIT A, page 4 of 4

EXHIBIT B

RELIANCE TREATED WOOD

POST OFFICE BOX 326 • NEWTOWN SQUARE, PA 19073 • TELEPHONE (215) 359-0400

PRODUCERS OF C.C.A. PRESSURE TREATED LUMBER & PLYWOOD, INTERIOR & EXTERIOR FIRE RETARDENT LUMBER & PLYWOOD OFFER THE FOLLOWING:

SHOW STOPPER SPECIAL

2 X 4 - 1 pkg./12', 1 pkg./16'

2 X 6 - 1 pkg./14'

2 X 8 - 1 pkg./12', 1 pkg./16'

4 X 4 - 1 pkg./8'

1 X 4 - 1 pkg./12'

AND YOUR CHOICE OF EITHER

3 X 5 - 1 pkg./8' OR 6 X 6 - 1 pkg./8'

THIS TRUCKLOAD OF C.C.A. 40 G'S #2 SOUTHERN YELLOW PINE CAN PUT YOU IN THE PRESSURE TREATED LUMBER BUSINESS FOR ONLY $4,300.00 AND A SMALL DELIVERY CHARGE TO YOUR YARD.

FLAMEGUARD

UNDERWRITERS LABORATORIES TESTED AND CERTIFIED

Fire Retardant

EXTERIOR CLASS "A" RATING INTERIOR

CLAUDE SHANNON JIM BRADY RITCH BENNER

EXHIBIT B

BOOTH 16

TIMBER PRODUCTS INSPECTION

GC2050010

A W P B

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Reliance Wood Preserving, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at Federalsburg Industrial Park, P.O. Box 349, in the City of Federalsburg, State of Maryland.

Respondent Daniel Roy Dorman is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *"ASTM E 84"* is a test recognized in the lumber industry as a

measure of the fire retardancy of wood based on the rate of flame spread.

B. An *"ASTM E 84 flame spread index"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

C. *"Fire Retardant Treated Wood" or "FRTW"* is wood chemically treated under pressure with fire retardant chemicals and has an ASTM flame spread index of 25 or less.

D. *"Respondents' FRTW" is wood that Reliance and Dorman represented as being fire retardant or Class "A" or having a flame spread of 25 or less.*

E. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

F. *"Flameguard"* is a brand name that respondents use for their FRTW.

G. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

I.

It is ordered, That Reliance Wood Preserving, Inc., and Daniel Roy Dorman, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertisement, offering for sale, sale, or distribution of respondents' FRTW, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that:

A. Respondents' FRTW is fire retardant, unless such is the fact;

B. Respondents' FRTW possesses a flame spread index of 25 or less, unless such is the fact;

C. Respondents' FRTW possesses a class "A" rating, unless such is the fact;

D. Respondents' FRTW has specified fire retardant properties, unless such is the fact;

E. Respondents' FRTW is classified or otherwise approved by UL, unless such is the fact;

F. Respondents' FRTW is quality assured or otherwise approved by Timber Products Inspection, unless such is the fact;

G. Respondents' FRTW is certified or otherwise approved by the American Wood Preservers' Bureau, unless such is the fact; and

H. Respondents' FRTW is certified or otherwise approved by any

organization, individual, or governmental agency, unless such is the fact.

For at least three years from the last dissemination of any such representation, respondents shall maintain records to be made available upon reasonable request for review by the Federal Trade Commission substantiating representations referred to in this section of the order. Substantiation for representations in Sections I.A. through I.D. shall consist of certifications or tests made in accordance with customary industry standards by an inspection service for fire retardant wood recognized by one of the following bodies: Building Officials and Code Administrators International, Inc.; International Conference of Building Officials; or the Southern Building Code Congress International, Inc.

II.

It is further ordered, That, within fifteen (15) days after the date of service of this order, respondent Reliance Wood Preserving, Inc., shall request that the follow-up service currently inspecting its FRTW confirm that it is inspecting respondents' FRTW by forwarding to the service a letter in the form attached as Appendix A.

III.

It is further ordered, That, within fifteen (15) days after the date of service of this order, respondents shall notify all purchasers of respondents' FRTW prior to April 15, 1985, that some of respondents' FRTW sold prior to April 15, 1985, may not have the fire retardant properties specified in respondents' representations concerning that FRTW. Such notice in the form of Appendix B shall be made by postage pre-paid, certified mail, return receipt requested, addressed to the last known address of the purchasers of respondents' FRTW who purchased prior to April 15, 1985, as reflected in respondents' business records and in a list furnished to respondents by Reliance Treated Wood, Inc., Greensboro, N.C.

IV.

It is further ordered, That respondent, Reliance Wood Preserving, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in its

organization that may affect compliance obligations arising out of this order.

V.

It is further ordered, That the individual respondent Daniel Roy Dorman notify the Commission fifteen (15) days in advance of any proposed change of his affiliation with respondent Reliance and within fifteen (15) days of any new affiliation that he has with any corporation, partnership, proprietorship, or other business entity engaged in the manufacture, advertisement, offering for sale, sale, or distribution of fire retardant treated wood.

VI.

It is further ordered, That, within fifteen (15) days after service of this order, respondent Reliance Wood Preserving, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of Reliance Wood Preserving, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of Reliance Wood Preserving, Inc., within fifteen (15) days after each new officer or director is appointed or relected, and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order, including a list of the individuals or entities notified pursuant to Paragraph III of this order together with a copy of the return receipts from such individuals or entities showing their receipt of such required notification.

B. In addition to the report required by VII(A), each respondent shall file or cause to be filed, within sixty days after service of this order, copies of the most recent ASTM E 84 tests conducted to obtain certification that each species of respondents' FRTW is fire retardant together with reports from the follow-up service utilized by respondents regarding its two most recent follow-up inspections.

C. In addition to the report required by VII(A) and test results

required by VII(B), each respondent shall file or cause to be filed, one (1) year after the date of service of this order and at such times as the Commission or its staff by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this order.

APPENDIX A

[Date]

Dear_____:

On _____ Reliance Wood Preserving, Inc., entered into a consent agreement with the Federal Trade Commission. The agreement, among other things, requires Reliance to possess substantiation for the claim that Reliance's fire retardant treated wood ("FRTW") is fire retardant (*i.e.*, has a flame spread index of 25 or less).

Reliance requests that you write a letter directly to the Commission confirming that you are currently performing follow-up inspections to assure that Reliance's FRTW is in fact fire retardant. In your letter, please indicate that you will notify the Commission should you cease performing follow-up inspections on Reliance's FRTW. Your letter should be sent to the address below:

Federal Trade Commission
Division of Enforcement
6th Street & Pennsylvania Ave.
Washington, D.C. 20580

Your cooperation will be greatly appreciated.

Reliance Wood Preserving, Inc.

By: _____

APPENDIX B

[Date]

Dear [Customer:]

On _____Reliance Wood Preserving, Inc., entered into a consent agreement with the Federal Trade Commission settling charges that some Flameguard fire retardant treated wood (FRTW) manufactured and sold prior to April 15, 1985, may not in fact be fire retardant.

Most of our FRTW is sold by Reliance Treated Wood, Inc., a subsidiary of McCoy Industries, Inc., both of which are located in Greensboro, N.C.

Because our records and/or Reliance Treated Wood's records indicate that you may have purchased Flameguard during the applicable time period, our agreement with the Federal Trade Commission requires us to notify you of the possibility that some Flameguard fire retardant treated wood may not be fire retardant so that you may take whatever steps, if any, that you deem appropriate. Please bear in mind that only FRTW manufactured and sold prior to April 15, 1985, is involved.

Reliance Wood Preserving, Inc.

By: _____

DISSENTING STATEMENT OF COMMISSIONER, ANDREW J. STRENIO, JR.

I would reject the agreement for the reasons specified at length in my earlier dissent from the Commission action of December 29, 1986 accepting the consent agreement, subject to final approval. In my view, both the danger to public safety from the misrepresentations alleged in this matter and the difficulty for consumers of detecting the existence and extent of injury indicate that monetary redress should be included in the settlement.

In the absence of any such monetary redress, I respectfully dissent from the Commission's action granting final approval to this consent agreement.

IN THE MATTER OF

MCCOY INDUSTRIES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3211. Complaint, April 2, 1987—Decision, April 2, 1987

This consent order prohibits, among other things, the Greensboro, N.C.-based retailer of flame-retardant, pressure-treated wood from misrepresenting the flame-retardant value of its products and requires respondents to notify purchasers that some of the wood may not meet established safety standards.

Appearances

For the Commission: *Charles Peterson* and *Truett M. Honeycutt.*

For the respondents: *Richard Vandore,* Greensboro, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Reliance Wood Preserving, Inc., a corporation, McCoy Industries, Inc., a corporation, Reliance Treated Wood, Inc., a corporation, and Daniel Roy Dorman, individually and as an officer of Reliance Wood Preserving, Inc., ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Reliance Wood Preserving, Inc. (Reliance), is a Maryland corporation with its office and principal place of business located in the Federalsburg Industrial Park, P.O. Box 349, Federalsburg, Maryland 21632. Respondent Reliance manufactures, advertises, and sells fire retardant treated wood (FRTW).

(b) Respondent Daniel Roy Dorman (Dorman) resides in the State of Maryland. He is president of respondent Reliance; he directs, controls, formulates, or participates in the acts and practices of respondent Reliance.

(c) Respondent Reliance Treated Wood, Inc. (Treated Wood), is a North Carolina corporation with its office located at 300 East Wendover Avenue, Greensboro, North Carolina 27420 and its principal place of business located at Federalsburg Office Park, Federalsburg, Maryland. Respondent Treated Wood advertises and sells FRTW.

(d) Respondent McCoy Industries, Inc. (McCoy), is a North Carolina

corporation with its office and principal place of business located at 300 East Wendover Avenue, Greensboro, North Carolina 27420. McCoy owns 100% of the outstanding stock of respondent Treated Wood.

DEFINITIONS

PAR. 2. For the purposes of this complaint, the following definitions apply:

a. *"ASTM E 84"* is a test recognized in the lumber industry as a measure of the fire retardancy of wood based on the rate of flame spread.

b. An *"ASTM E 84 flame spread index'"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

c. *"Fire Retardant Treated Wood"* or *"FRTW'"* is wood that has an ASTM flame spread index of 25 or less and is chemically treated under pressure with fire retardant chemicals.

d. *"Respondents' FRTW"* means wood that Reliance has represented or Treated Wood has advertised as being fire retardant or class "A" or having a flame spread of 25 or less.

e. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

f. *"Flameguard"* is a brand name that respondents use for their FRTW.

g. *"Underwriters Laboratories"* (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

h. *"The American Wood Preservers Bureau"* is an industry association concerned with the quality of wood.

i. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

PAR. 3: The acts and practices of respondents alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

PAR. 4: The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 5: Respondents Reliance and Dorman have placed labels on respondents' FRTW that read as follows:

a. FLAMEGUARD
ASTM-E 84 25 OR LESS
MEA 140–83 M
Exterior

b. 83 FLAMEGUARD 84
Fire Retardant Treated Wood
ASTM-E 84 25 OR LESS
Reliance Wood Preserving, Inc.,
Federalsburg, Maryland
Quality assured by Timber Products Inspection

PAR. 6: Through the use of the labels on respondents' FRTW described in paragraph five above, respondents Reliance and Dorman have made the following material representations, directly or by implication:

(1) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, has a flame spread index of 25 or less as measured by the ASTM E 84 test.

(2) Respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, is quality assured or otherwise approved by Timber Products Inspection.

PAR. 7: In truth and in fact:

(1) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, does not have a flame spread index of 25 or less.

(2) At least some of respondents' FRTW bearing the labels placed on it by respondents Reliance and Dorman, as described in paragraph five above, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection. Therefore, the representations set forth in paragraph six were and are false and misleading.

COUNT II

PAR. 8: The allegations contained in paragraphs one through three are incorporated herein by reference.

PAR. 9: Respondent Treated Wood advertises FRTW through promotional flyers and brochures. In such advertisements, Treated Wood has made various statements, prior to April 15, 1985, concerning the

fire retardant properties and the quality classifications, approvals, or certifications of respondents' FRTW. Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit A:

a. "Flameguard has a low flame spread index of 25 or less";
b. "Flameguard is UL classified";
c. "All tests have been conducted and certified by the TPI Agency, Conyers, Georgia"; and
d. "All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance Flameguard to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials (ASTM-E 84 . . .) . . . ."

PAR. 10. Typical and illustrative of the statements made by Treated Wood, prior to April 15, 1985, concerning respondents' FRTW, but not all-inclusive thereof, are the following from the promotional flyer attached hereto as Exhibit B:

a. "Flameguard Underwriters Laboratories tested and certified";
b. "Fire retardant";
c. "Class 'A' rating";
d. A depiction of Timber Products Inspection's logo; and
e. A depiction of the American Wood Preservers Bureau's logo.

PAR. 11: Through the use of the statements contained in paragraphs nine and ten above and other statements not specifically set forth herein, Treated Wood has made the following material representations, directly or by implication:

(1) Respondents' FRTW has a flame spread index of 25 or less.
(2) Respondents' FRTW possesses a class "A" rating.
(3) UL classifies or otherwise approves respondents' FRTW.
(4) Timber Products Inspection assures the quality of or otherwise approves respondents' FRTW.
(5) American Wood Preservers Bureau approves or certifies respondents' FRTW for fire retardancy.

PAR. 12: In truth and in fact:

(1) At least some of respondents' FRTW, which was sold prior to April 15, 1985, has a flame spread index higher than 25.
(2) At least some of respondent's FRTW, which was sold prior to April 15, 1985, does not possess a class 'A" rating.
(3) UL has not classified or otherwise approved respondents' FRTW.

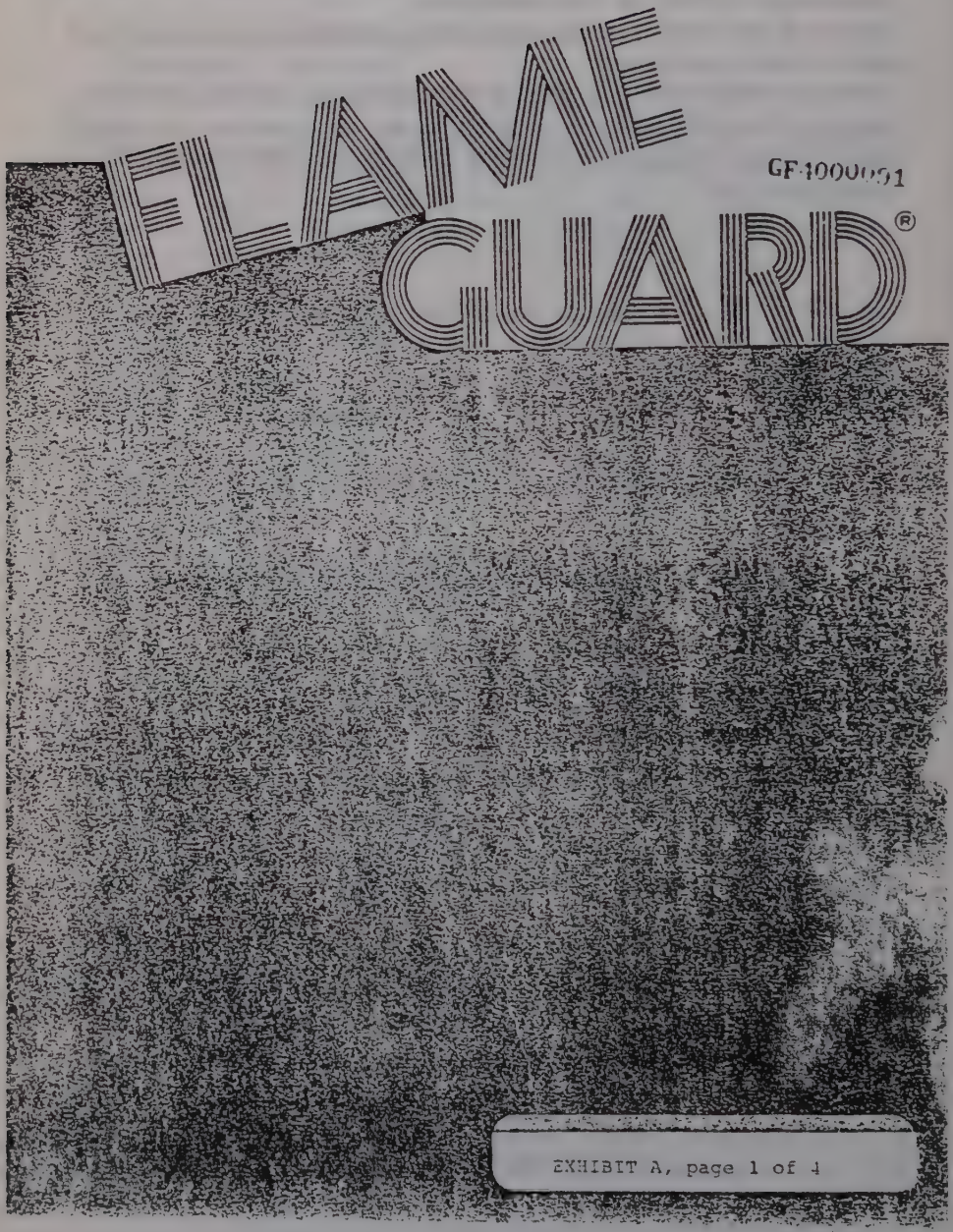
(4) At least some of respondents' FRTW, which was sold prior to April 15, 1985, is not quality assured or otherwise approved by Timber Products Inspection.

(5) American Wood Preservers Bureau has not approved or certified respondents' FRTW for fire retardancy.

Therefore, the representations set forth in paragraph eleven were and are false and misleading.

PAR. 13: The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A

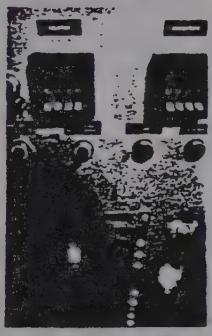


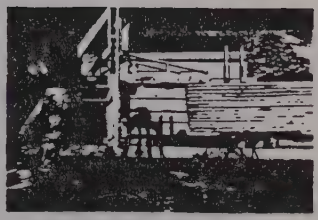
RELIANCE®

FLAMEGUARD® FIRE-RETARDANT TREATED WOOD HAS MANY USES.

FLAMEGUARD® pressure-treated wood products can be used both for interior or exterior construction where safety from fire is mandatory. Flameguard fire-retardant wood is ideal for roof and floor trusses, beams, roofdecks, trim, loadbearing and non-bearing partitions, steps, stairways, ladders, scaffolding, siding, framing, balconies, walkways and facades or any other application that requires fire-resistant and noncombustible building materials.

As Flameguard treated wood remains clear and will not develop the unsightly surface bloom common with many other fire retardant treatments, Flameguard products are particularly suited to architectural millwork, moldings, and paneling.





ADVANTAGES

FLAMEGUARD is a special formulation of fire retardant chemicals pressure impregnated for maximum wood penetration and protection.

FLAMEGUARD has a low flame spread rating of 25 or less and generates low smoke levels. Its self-extinguishing characteristic eliminates wood so treated as a source of fuel thereby limiting the spread of fire.

FLAMEGUARD fire-retardant treated wood retains its strength under fire conditions longer than untreated wood and many other building materials including steel.

FLAMEGUARD has a very low hygroscopicity and does not absorb and retain moisture even in high humidities. Use in humidities up to 95% is recommended.

FLAMEGUARD is compatible with metal fasteners. Unlike the sulphate and chloride contained in many fire-retardant treatments, the chemicals in our process are non-corrosive.

FLAMEGUARD is a clear fire-retardant treatment which causes little, if any, change in the original color of the wood. Unlike wood treated with other fire-retardant processes, Flameguard products are free of chemical deposits and have no unsightly residue to mar the surface of the wood.

GF-1000092

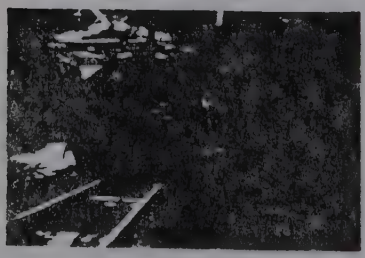
FLAMEGUARD is non-blooming even in extremely humid conditions. Like untreated wood, Flameguard treated wood will weather naturally.

FLAMEGUARD treated wood does not require sealing. The surface of the treated wood will remain clean and can be left unfinished, stained or painted with oil based products.

FLAMEGUARD fire-retardant treated wood qualifies for lower insurance rates with major rating organizations In many states buildings constructed with fire-retardant treated lumber is granted the same rating as masonry construction and is classified similar to noncombustible material. Shingles treated with Fireguard carry a B rating without foil being placed under them.

FLAMEGUARD is halogen free and is acceptable for construction of nuclear power plants. Free formaldehyde is not given off by Flameguard treated wood.

FLAMEGUARD treated wood, although not marketed as preservative-treated products, does give protection from decay since the wood is sealed and the chemicals are toxic to insects.



FLAMEGUARD is injected through a pressure treatment that forces the fire-retardant chemicals into wood without injuring the wood fibers. The process is operated on a time-pressure schedule that equalizes the natural differences present in lumber and plywood.

FLAMEGUARD reduces the splitting and checking characteristics of untreated wood.

FLAMEGUARD treated wood is readily available with substantial inventories of treated wood products and an abundant supply of raw materials.

SPECIFICATIONS

All lumber and plywood to be fire-retardant treated will be pressure treated with Reliance® Flameguard® to comply with the requirements of a flame spread rating of 25 or less when tested for a period of not less than 30 minutes without evidence of significant progressive combustion in accordance with the standard test method for surface burning characteristics of building materials (ASTM E-84, NFPA 255, AWPA C-20 and C-27) UL 723

Each treated product will be tested and will bear the performance identification label assuring its compliance with the standards of the American Wood Preservers Association.

Shingles and shakes will be fire-retardant pressure treated to meet the requirements for a Class B or Class C covering in accordance with the Standard Test, ASTM E-108 Test for Roof Covering Materials.

STANDARDS AND APPROVALS

Flameguard® meets the requirements of the following specifying agencies: Federal Specification MIL-L-19140C; Building Officials and Code Administrators International; International Conference of Building Officials; Southern Building Code Congress International, Inc.; National Fire Protection Association, Inc.; American Wood Preservers Association; National Building Code, Insurance Services Office, Nuclear Energy Liability Property Insurance Association and many other local, county and state building codes, insurance underwriters and rating bureaus.

All tests have been conducted and certified by The T.P.I. Agency, Conyers, Georgia.

Flameguard is U.L. Classified (U.L. 723).

Flameguard® treated lumber and plywood is a product of Reliance® Treated Wood. For additional information or to place orders contact one of our offices:

RELIANCE
TREATED WOOD

P.O. Box 22101
Greensboro, NC 27420
919/379-0801
Outside North Carolina 800/334-9113

P.O. Box 400
Federalsburg, MD 21632
301/754-5711

P.O. Box 203
Newtown Square, PA 19073
215/353-6466

GF-4000094

EXHIBIT A, page 4 of 4

EXHIBIT B

RELIANCE TREATED WOOD

POST OFFICE BOX 306 • NEWTOWN SQUARE, PA 19073 • TELEPHONE (215) 356-0400

PRODUCERS OF C.C.A. PRESSURE TREATED LUMBER & PLYWOOD, INTERIOR & EXTERIOR FIRE RETARDENT LUMBER & PLYWOOD OFFER THE FOLLOWING:

SHOW STOPPER SPECIAL

2 X 4 - 1 pkg./12', 1 pkg./16'

2 X 6 - 1 pkg./14'

2 X 8 - 1 pkg./12', 1 pkg./16'

4 X 4 - 1 pkg./8'

1 X 4 - 1 pkg./12'

AND YOUR CHOICE OF EITHER

3 X 5 - 1 pkg./8' OR 6 X 6 - 1 pkg./8'

THIS TRUCKLOAD OF C.C.A. 40 G'S #2 SOUTHERN YELLOW PINE CAN SET YOU IN THE PRESSURE TREATED LUMBER BUSINESS FOR ONLY $4,300.00 AND A SMALL DELIVERY CHARGE TO YOUR YARD.

FLAMEGUARD

UNDERWRITERS LABORATORIES TESTED AND CERTIFIED

Fire Retardant

EXTERIOR CLASS "A" RATING INTERIOR

CLAUDE SHANNON JIM BRADY RITCH BENNER

EXHIBIT B BOOTH 16

TIMBER PRODUCTS INSPECTION GC2050010

A W P B

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, who were represented by counsel, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents McCoy Industries, Inc., and Reliance Treated Wood, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of North Carolina., with their offices and principal places of business located at 300 East Wendover Avenue, in the City of Greensboro, State of North Carolina.

Respondent McCoy Industries, Inc. (McCoy), owns 100% of the outstanding stock of respondent Reliance Treated Wood, Inc. (Treated Wood).

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *"ASTM E 84'"* is a test recognized in the lumber industry as a

measure of the fire retardancy of wood based on the rate of flame spread.

B. An *"ASTM E 84 flame spread index"* (flame spread index) of 25 or less is the score that most, if not all, building codes require a wood product to obtain in order to be used in certain applications where FRTW is required.

C. *"Fire Retardant Treated Wood"* or *"FRTW"* is wood chemically treated under pressure with fire retardant chemicals and has an ASTM flame spread index of 25 or less.

D. *"Treated Wood's FRTW"* is wood that Treated Wood has represented as being fire retardant or Class "A" or having a flame spread of 25 or less.

E. A *"class 'A' rating"* means that FRTW possesses a flame spread index of 25 or less.

F. *"Flameguard"* is a brand name that respondent Treated Wood uses for its FRTW.

G. *"Underwriters Laboratories"* (UL) is a laboratory that, among other things, tests the fire retardancy of wood and performs quality control inspections of FRTW.

H. *"The American Wood Preservers Bureau"* is an industry association concerned with the quality of wood.

I. *"Timber Products Inspection"* is a quality control agency that, among other things, attests to the fact that wood is fire retardant.

I.

It is ordered, That Reliance Treated Wood, Inc., and McCoy Industries, Inc., directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertisement, offering for sale, sale, or distribution of Treated Wood's FRTW, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that:

A. Treated Wood's FRTW is fire retardant, unless such is the fact;

B. Treated Wood's FRTW possesses a flame spread index of 25 or less, unless such is the fact;

C. Treated Wood's FRTW possesses a class "A" rating, unless such is the fact;

D. Treated Wood's FRTW has specified fire retardant properties, unless such is the fact;

E. Treated Wood's FRTW is classified or otherwise approved by UL, unless such is the fact;

F. Treated Wood's FRTW is quality assured or otherwise approved by Timber Products Inspection, unless such is the fact;

G. Treated Wood's FRTW is certified or otherwise approved by the American Wood Preservers Bureau, unless such is the fact; and

H. Treated Wood's FRTW is certified or otherwise approved by any organization, individual, or governmental agency, unless such is the fact.

For at least three years from the last dissemination of any such representation, respondents shall maintain records to be made available upon reasonable request for review by the Federal Trade Commission substantiating representations referred to in this section of the order. Substantiation for representations in Sections I.A. through I.D. shall consist of certifications or tests made in accordance with customary industry standards by an inspection service for fire retardant wood recognized by one of the following bodies: Building Officials and Code Administrators International, Inc.; International Conference of Building Officials; or the Southern Building Code Congress International, Inc.

II.

It is further ordered, That, within fifteen (15) days after the date of service of this order, respondents shall furnish to Reliance Wood Preserving, Inc., Federalsburg, Maryland, the name and last known address of each purchaser of Treated Wood's FRTW that purchased such FRTW prior to April 15, 1985, as reflected in respondents' business records.

III.

It is further ordered, That each respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in its organization that may affect compliance obligations arising out of this order.

IV.

It is further ordered, That:

A. Within fifteen (15) days after service of this order, respondent Reliance Treated Wood, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director

of Reliance Treated Wood, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of Reliance Treated Wood, Inc., within fifteen (15) days after each new officer or director is appointed or elected, and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

B. Within fifteen (15) days after service of this order, respondent McCoy Industries, Inc., shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of McCoy Industries, Inc., and, for a period of three (3) years after that date, shall provide a copy of such order and complaint to each new officer and director of McCoy Industries, Inc., within fifteen (15) days after each new officer or director is appointed or elected and shall secure from each current and future officer and director a signed statement acknowledging receipt of such copy.

V.

It is further ordered, That:

A. Within sixty (60) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and from in which it has complied with this order.

B. In addition to the report required by V(A), each respondent shall file or cause to be filed, within sixty days after service of this order, copies of the most recent ASTM E 84 tests conducted to obtain certification that each species of Treated Wood's FRTW is fire retardant together with reports from the follow-up service utilized regarding its two most recent follow-up inspections.

C. In addition to the report required by V(A) and test results required by V(B), each respondent shall file or cause to be filed, one (1) year after the date of service of this order and at such times as the Commission or its staff by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this form.

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I would reject the agreement for the reasons specified at length in my earlier dissent from the Commission action of December 29, 1986 accepting the consent agreement, subject to final approval. In my view, both the danger to public safety from the misrepresentations alleged in this matter and the difficulty for consumers of detecting the

existence and extent of injury indicate that monetary redress should be included in the settlement.

In the absence of any such monetary redress, I respectfully dissent from the Commission's action granting final approval to this consent agreement.

IN THE MATTER OF

FORD MOTOR COMPANY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9073. Consent Order, March 29, 1979—Modifying Order, April 3, 1987

The Federal Trade Commission has modified a 1979 consent order with Ford Motor Co. and Ford Motor Credit Co. (93 F.T.C. 402) by replacing procedures for the sale of repossessed cars and light trucks. The modified order has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide its dealers to give them guidance in handling repossessions in various states. Additionally, the modified order eliminates specific limitations on deductions dealers were allowed to take when calculating surpluses and substitutes a provision permitting them to deduct costs allowed under state law.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On November 12, 1986, Ford Motor Company and Ford Motor Credit Company ("Ford") filed a request pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, to reopen the proceeding and vacate or modify the cease and desist order entered against Ford on March 29, 1979, in Docket No. 9073, 93 F.T.C. 402.

This matter arose out of allegations that certain franchised Ford dealerships and certain dealerships owned in whole or in part by Ford were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor [2] vehicles.[1] A complaint was issued against Ford and Francis Ford, Inc., a franchised Ford dealer, on February 10, 1976. Subsequently, the matter was withdrawn from litigation with respect to Ford, who consented to the order at issue here.

One of the principal features of the Ford order is a repossession accounting procedure that Ford was required to make a part of the Ford Manual of Dealer Accounting Procedure, which is binding on its dealers through various sales and service agreements. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses by Ford dealers. The order limits deductible

[1] The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees. *See* U.C.C. Section 9–504.

expenses to specified direct out-of-pocket expenses under the repossession accounting procedure.

The complaint against Francis Ford was tried administratively and led to an order that limited the deductible expenses in accounting for repossessions to the same specified expenses that were allowable under the repossession accounting procedure featured in the order against Ford. Francis Ford appealed the Commission's decision and order to the Ninth Circuit Court of Appeals. That court vacated the order against Francis [3] Ford in *Ford Motor Co. v. FTC,* 673 F.2d 1008 (9th Cir. 1981), *certd. denied sub nom. FTC v. Francis Ford, Inc.,* 459 U.S. 999 (1982), ruling that the Commission should have proceeded by rulemaking rather than adjudication.

Ford's petition asks the Commission to reopen the proceeding and either vacate or modify the order. Ford offers several arguments in support of its request. First, Ford argues that the order competitively disadvantages Ford dealers compared to dealers of motor vehicles manufactured by companies not under similar orders (referred to as foreign dealers), since the repossession accounting procedure forces Ford dealers to absorb costs that other dealers can recoup under applicable state law. Second, it is argued that the *Francis Ford* decision precludes enforcement of the Commission's repossession policy against dealers, so that the Commission should not continue to enforce it against manufacturers. Third, it is argued that the *Francis Ford* decision triggers the provisions of the "most favored company" clause since it represents a less restrictive adjudicated order that requires deletion of Parts II and VI of the order. Fourth, it is argued that the *Francis Ford* decision raises questions about the Commission's jurisdiction over the matter. Fifth, it is argued that the Commission's 1980 Unfairness Policy Statement represents a changed condition of law that requires vacation or modification of the order.

The National Automobile Dealers Association (NADA), a national trade association representing approximately 19,000 franchised new car and truck dealers, filed comments supporting [4] the Ford respondents' request in response to the Commission's request for public comment published on December 4, 1986, 51 *Fed. Reg.* 43746. NADA's comments track the Ford respondents' arguments and put forward one additional argument: that the failure to include repossession accounting provisions in the Commission's Credit Practices Trade Regulation Rule resulted in less restrictive standards that trigger provisions of the "most favored company" clause.

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen and consider modification of an existing order upon a satisfactory showing by the party subject to the order that changed conditions of law or fact require modification. The stat-

ute also provides that the Commission may reopen and modify or set aside an order "if the public interest shall so require." *See* 15 U.S.C. 45(b) (1982); 16 C.F.R. 2.51, 3.72 (1986). The Commission has decided to grant in part the Ford petition on the ground that, although the petition does not make a showing of changed circumstances of law or fact sufficient to warrant this action, the action is justified in the public interest.

Most of the arguments advanced by the Ford respondents were also made by General Motors (GM) in a similar request that the Commission denied on November 28, 1984, in Docket No. 9074. With respect to GM's argument that the GM order placed its dealers at a competitive disadvantage compared to foreign car dealers, the Commission noted that GM had presented no evidence that the order's provisions imposed significant financial burdens on GM [5] dealers that were not also borne by foreign dealers who comply with their obligation under state law to account for and pay surpluses.

In contrast, Ford's petition contains concrete evidence of competitive disadvantage. Ford submitted the results of a survey of 100 dealers whose repossession practices were audited under the order. The survey identifies five categories of costs that Ford dealers are required to absorb in whole or in part, but that dealers operating under state law standards generally are able to recoup. The petition then estimates the cost disadvantage this places on the universe of Ford dealers who handle repossessions. Although Ford's methodology probably overstates the actual cost disadvantage to Ford dealers because most repossession sales result in deficiencies rather than surpluses and because most deficiencies are not recovered, the Commission finds that the cost disadvantage is nevertheless real and substantial and that modifications to the order are therefore warranted in the public interest.[2] The Commission therefore will make appropriate modifications to the order to remove the competitive disadvantage Ford dealers suffer under the existing accounting procedure.

The remaining arguments made in Ford's petition and in the NADA comments do not justify vacating or further modifying the [6] order. Ford argues the Commission should not continue to enforce its orders against manufacturers since it cannot proceed against dealers after the decision in *Francis Ford.* That is not our reading of *Francis Ford,* but in any event the modifications to the order that are being made to remove the competitive disadvantage to Ford dealers will result in dealers and manufacturers alike being subject to the same

[2] In addition, as the NADA comments noted, the order may have the unintended effect of raising financing costs to a number of purchasers of Ford vehicles because of the tendency of a number of Ford dealers to minimize their compliance burden and attendant costs by assigning retail installment contracts on a non-recourse basis, which are generally more costly than recourse assignments.

requirement to account for and pay surpluses in accordance with state law.

Ford next argues that the "most favored company" clause in Part VII.B. of the order is triggered by the decision in *Francis Ford* and requires deletion of Parts II throught VI of the order. The "most favored company" clause states that the Commission will modify the Ford order to match any adjudicated or consent order in three related proceedings that prescribes less restrictive standards for disposing of repossessed vehicles or determining surpluses or redemption rights. The clause on its face limits its coverage to *order-prescribed* standards. Because the *Francis Ford* decision failed to prescribe less restrictive standards, the "most favored company" clause is not triggered. Nor does the decision in the Credit Practices Rule, where the Commission declined to impose standards to account for deficiencies in repossession sales, trigger a similar "most favored treatment" clause referring to the rule, as NADA argues. [7]

Ford also suggests that the order should be vacated or modified because the Commission lacks jurisdiction after *Francis Ford* and because the order does not meet the requirements of the Commission's 1980 Unfairness Policy Statement. The *Francis Ford* decision attacked the procedure by which the Commission chose to proceed but not its jurisdiction. Thus there has been no change in the Commission's jurisdiction over dealers who fail to pay surpluses to consumers. Similarly, the Commission's Unfairness Policy Statement does not change the law and does not support vacation of the order.

It is therefore ordered, That the proceeding be reopened and that the final order issued March 29, 1979, in Docket No. 9073 be, and it hereby is modified to read as follows:

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *"Ford respondents"* means Ford Motor Company ("Ford") and Ford Motor Credit Company ("Ford Credit"), corporations. References to either or both of the Ford respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. *Provided,* [8] *however,* that references to Ford shall not include Ford Credit and references to either or both of the Ford respondents shall not include dealerships.

B. *"Vehicle"* means a passenger car or a truck with a gross vehicle weight less than 26,000 pounds (11,794 kilograms).

C. *"Dealership"* or *"dealer"* means a corporation, partnership or proprietorship that is a Ford, Lincoln or Mercury vehicle dealership but excludes truck dealerships whose principal business is the sale of trucks with a gross vehicle weight more than 8,000 pounds (3,629 kilograms).

D. *"Retail sale"* means the installment credit sale of a vehicle, other than for purposes of resale *(e.g.,* sale to dealers or wholesalers), lease or rental, to a purchaser who is not a fleet purchaser.

E. *"Repurchase financing"* means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a *"repurchase," "recourse,"* or *"guaranty"* agreement) which provides that the dealership is obligated to pay off the **[9]** outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. *"Repurchase dealership"* or *"repurchase dealer"* means a dealership that engages more than occasionally in repurchase financing transactions.

G. *"Equity dealership"* means a dealership in which Ford has a controlling equity interest, holds 50 percent or more of the voting stock, or is entitled to elect 50 percent or more of the board of directors.

H. *"Liquidating dealership"* means an equity dealership that has ceased or is in the process of ceasing normal operation of a dealership and whose business has been or is being wound up by Ford or under Ford's supervision. It shall not mean a dealership not previously an equity dealership whose assets come into the possession or control of either of the Ford respondents by virtue of default on or compromise of a debt obligation.

I. *"Financing customer"* means a purchaser of a vehicle from a dealership by means of a retail installment contract. **[10]**

J. *"Disposition"* or *"dispose"* refers to a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; *i.e.,* it does not include a sale or lease to the financing institution, the dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed vehicle. Disposition or dispose shall not refer to the repurchase of a repossessed vehicle by a dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

K. *"Proceeds"* means whatever is received upon disposition of the repossessed vehicle, but exclusive of sales taxes, service contracts or separately priced warranties.

L. *"Allowable expenses"* means commercially reasonable expenses allowable under applicable state law. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for sale and [11] reselling of the vehicle, and not otherwise reimbursed to the dealership.

M. *"Contract balance"* means (1) the unpaid balance as of the date of repossession less applicable finance charge and insurance premium rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed prior to repossession.

N. *"Surplus"* means the excess of (1) the proceeds plus applicable insurance or warranty reimbursements received by the dealership or financing institution plus any other applicable rebates or credits not deducted by the financing institution, over (2) the contract balance, allowable expenses, and amounts paid to discharge any security interest provided for by law.

O. *"Pay"* or *"paid,"* in reference to payment of a surplus, means a commercially reasonable attempt to pay.

II.

It is further ordered, That Ford shall provide to all dealers within 60 days of the effective date of this modified order, and to each new dealer within 30 days of entering into a sales and [12] service agreement, a "repossession guide." The repossession guide shall be made part of the Ford Manual of Dealer Accounting Procedures and shall state that:

1. Each surplus should be determined according to Paragraphs I.J through I.N of this order and paid to the repurchase financing customer within a reasonable period of time;

2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;

3. Dispositions should be commercially reasonable, which in practice means that the dealer should make the same efforts to obtain the best available price for a repossessed vehicle as would be made for a comparable used vehicle except that a dealer is not required to offer a warranty without extra charge even though such warranties are provided on other used vehicles;

4. If any rebate owing to the repurchase financing customer's account has not been received at the time the Ford accounting form is completed, such rebate should be applied for promptly; [13]

5. If any rebate is received after completion of the Ford accounting form, any surplus or deficiency should be redetermined and any re-

maining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

6. An accounting form should be prepared by the dealer for each disposition of a repossessed vehicle and:

a. should set forth the calculation of each surplus, and of each deficiency upon which collection is attempted;

b. should be signed by a person authorized to sign retail installment contracts on behalf of the dealership;

c. a copy of the form should be sent with the surplus payment to each repurchase financing customer to whom a surplus is paid and to each repurchase financing customer from whom a deficiency is sought; and [14]

d. should be retained by the dealer, together with all relevant underlying documentation, for at least two years from the date of disposition;

7. Dealers should not obtain waivers of surplus or redemption rights from repurchase financing customers except as allowable under applicable state law.

8. Failure to account for and pay surpluses to customers may expose the dealer to legal action.

III.

It is further ordered, That Ford shall require each Ford employee who is a director of an equity dealership to:

1. Provide the repossession guide described in Part II of this order to each such dealership; and

2. Vote for resolutions so that each such dealership handles repossessions in accordance with applicable state law. [15]

IV.

It is further ordered, That Ford Credit:

A. Shall incorporate provisions to the following effect into the "Retail Plan" Section of its "Automotive Finance Plans for Ford Motor Company Dealers," and into any subsequent edition of that document or any comparable successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by Ford Credit to the customer;

3. dealers are to determine whether a surplus exists on a repurchase financing repossession according to the repossession guide described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses; [16]

5. dealers are to account for and pay each surplus within a reasonable period of time of disposition.

B. Shall develop and distribute to all dealers who use Ford Credit's form of retail installment contract, revised Ford Credit retail installment contract forms that include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than commercially reasonable expenses incurred as a direct result of repossessing (including, where permitted, attorney's fees and court costs), holding, preparing for sale and selling the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

C. Shall include the following information in clear lay language in at least one notice sent prior to repossession to every Ford Credit repurchase financing [17] customer to whom a notice of intent to repossess is sent:

1. the total amount past due at the time the notice is mailed;

2. in transactions where the customer is entitled to reinstatement of the contract, the customer will have an absolute right to such reinstatement and to regain possession of the vehicle by paying all past due installments and by paying such other amounts and fulfilling such other conditions as provided by law;

3. that the customer will have an absolute right to redeem the vehicle at any time prior to a binding agreement for its disposition, and that this right can be exercised by paying the contract balance plus all expenses incurred as a direct result of repossessing, holding and preparing the vehicle for sale;

4. the date or interval of time prior to which the vehicle will not be sold; [18]

5. that if the vehicle is not redeemed or the contract reinstated, the customer will be entitled to a refund of any surplus within a reasonable period of time;

6. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law.

D. Shall establish and follow a procedure for uniformly sending a

written notice ("post-repossession notice") to Ford Credit financing customers as soon as practicable after repossession. Ford Credit shall periodically examine its branches' files, in accordance with its usual monitoring procedures, to determine whether the post-repossession notices have been and are being sent, and shall institute appropriate actions to assure that this procedure is adhered to. The post-repossession notice shall specify in clear, lay language:

1. the name, address and telephone number of the dealership to which the vehicle has been or will be returned for disposition, if applicable, and the [19] address and telephone number of the Ford Credit branch office to be contacted;

2. the date or interval of time within which the customer may reinstate the contract in states where the creditor is required to permit reinstatement of the contract;

3. the net amount necessary to redeem the vehicle, and, in transactions where the customer is entitled to reinstatement, the amount necessary to reinstate the contract, at the time the notice is sent;

4. the date or interval of time prior to which the vehicle will not be sold;

5. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition;

6. that additional expenses incurred as a direct result of holding and preparing the vehicle for sale may increase the amount necessary to redeem the vehicle if redemption is delayed; [20]

7. that Ford Credit should be contacted to reinstate the contract in states where the customer is entitled to reinstatement;

8. that Ford Credit should be contacted for further information about redemption, including the procedure for redeeming the vehicle;

9. that, where the vehicle has been returned to the dealer and is not redeemed or the contract is not reinstated, any surplus must be paid to the customer within a reasonable period of time after disposition (the notice also may state that a contract between the dealer and Ford Credit provides that the dealer is to pay any surplus);

10. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law;

11. that the customer may be liable for a deficiency or that state law prohibits Ford Credit and the dealer [21] from collecting any deficiency (the notice is to include the applicable language only);

12. that the customer has the right to direct the dealer to apply for a rebate of any unearned premiums payable by any insurance carrier

or agent from whom the dealer has, on behalf of the customer, obtained a credit life, accident and health or collision insurance policy.

E. Shall obtain no waivers of redemption or surplus rights from financing customers, except as allowable under applicable state law.

F. Shall, commencing three months and to be completed no later than twelve months after the effective date of this order, revise all pertinent Ford Credit forms, form letters, notices and internal written procedures to be consistent with the provisions of this order.

V.

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing [22] companies or vehicle dealerships than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive. *Provided, however,* that the Ford respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon. *Provided further* that this paragraph shall not be construed as exempting the Ford respondents from any Trade Regulation Rule, or as limiting in any way their legal right or standing to challenge or otherwise contest any Trade Regulation Rule. [23]

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073, or 9074 results in a final adjudicated or consent order prescribing standards less restrictive than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a Ford respondent's petition

pursuant to Section 3.72 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

C. In the event a Ford respondent is of the opinion that changed conditions of law require that this order be altered or modified, the Ford respondent may, pursuant to Section 3.72(b)(2) of the Commission's Rules of [**24**] Practice, file a petition requesting a reopening of this proceeding for that purpose.

VI.

It is further ordered, That:

A. The Ford respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order, including but not limited to copies of notices sent to financing customers pursuant to Paragraphs IV.C and D above. The Ford respondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission.

B. Ford shall forthwith distribute a copy of this order to its Ford, Lincoln-Mercury and Parts and Services divisions, and to the Dealer Development activity, and Ford Credit shall forthwith distribute a copy of this order to each of its regions.

C. Each of the Ford respondents shall notify the Commission at least thirty days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation or [**25**] corporations, the creation or dissolution of subsidiaries, the discontinuance of Ford's present program for investing in equity dealerships, or any other change which may affect compliance obligations arising out of this order.

In the Matter of

FOREMOST-McKESSON, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2427. Consent Order, July 26, 1973—Modifying Order, April 16, 1987

The Federal Trade Commission has modified a 1973 consent order (38 FR 22468) by setting aside the second paragraph, of the consent order, prohibiting material inducements to customers to attend respondent's trade shows.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Respondent McKesson Corporation ("McKesson")[1] filed a Petition to Reopen Proceeding and Set Aside Order ("Petition") on November 26, 1986, pursuant to Subsection 5(b) of the FTC Act, 15 U.S.C. 45(b). The Commission's order to cease and desist relates to McKesson's practices surrounding trade shows that it conducts for its retail drug store customers. McKesson is the largest wholesale distributor of drugs and druggists' sundries in the country.

McKesson requests the Commission to reopen the proceeding to set aside the two principal parts of the order on the basis of changed conditions of law and fact and the public interest. The Commission issued its order in this matter on July 26, 1973, with the consent of McKesson. 83 F.T.C. 228. The complaint and order were based upon alleged violations of Section 5 of the FTC Act. 15 U.S.C. 45. The first ordering paragraph prohibits McKesson from inducing promotional allowances and services from its suppliers in connection with trade shows when McKesson knows or has reason to know that such allowances and services are not available to its competitors on proportionally equal terms. The second part prohibits McKesson from providing material inducements to customers to attend McKesson's trade shows when the receipt is dependent on the volume of the customer's purchases.

The commission filed on January 10, 1979, a civil penalty action against respondent for violations of the order in this matter in *FTC v. Foremost-McKesson, Inc.*, No. 79 Civ. 0162 (PNL) (S.D.N.Y.). The civil penalty action focused upon national trade shows held by McKesson in 1976, 1977, and 1978 and attended by McKesson's retail customers. A Final Judgment and Permanent Injunction was entered on

[1] Respondent was formerly Foremost-McKesson, Inc. It changed its name to McKesson Corporation in 1983.

November 23, 1983, with the consent of the parties. Under the judgment, McKesson paid civil penalties and was prohibited for ten years from inducing any promotional allowances that were not available to its competitors on proportionally equal terms. This paragraph in the court's injunction parallels the prohibition in the Commission's order against inducing disproportionate promotional allowances.

A. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Subsection 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Subsection 5(b) does not require that the Commission modify any order. S.Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979). *See* Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.,* Docket No. C-2902 on November 14, 1986.

Subsection 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. If respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *See* Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.,* Docket No. C–2902 on November 14, 1986.

B. THE PROHIBITION AGAINST THE KNOWING INDUCEMENT OF DISCRIMINATORY PROMOTIONAL ALLOWANCES AND SERVICES

Respondent first seeks to have the prohibition against the knowing inducement of discriminatory promotional allowances and services set aside because the Commission's recent decision in *General Motors Corp.*, 103 F.T.C. 641 (1984) *("G.M.")*, is a changed condition of law. In *G.M.*, the Commission restricted use of Section 5 of the FTC Act to expand the "spirit" of *per se* liability of Subsection 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d), to conduct not otherwise covered by the "letter" of the Robinson-Patman Act. The Commission chose to limit the "spirit" theory to conduct that was actually anticompetitive. According to McKesson, the first paragraph in its order does not prohibit conduct that is either anticompetitive or unlawful under the Robinson-Patman Act.

The Commission has long prohibited, pursuant to Section 5 of the FTC Act, a buyer from inducing promotional allowances and services that it knows or has reason to know are not available to its competitors on proportionally equal terms. *See, e.g., Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962). This prohibition is also embodied in the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.14. The prohibition arises from Subsections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d) and 13(e), which prohibit sellers from providing promotional allowances and services to any firm in connection with the resale of that supplier's products unless such allowances or services are available to the firm's competitors on proportionally equal terms. Discriminatory promotional allowances and services are *per se* unlawful, that is, unlawful without a demonstration of an injury to competition. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

Although the Robinson-Patman Act does not itself prohibit the inducement of such allowances and services, the Commission has employed Section 5 of the FTC Act to prohibit such buyer inducements. The omission of buyer liability under the Robinson-Patman Act was deemed by the court of appeals in *Grand Union* to be "more 'inadvertent' than 'studious.' " 300 F.2d at 96 (footnote omitted). The court observed that "[s]ince * * * there can be no unlawful preference made by a seller unless it was received by a buyer, it is clear that Congress did not intend to sanction buyers to continue to engage in the unlawful activity." *Id.* at 97 (footnote omitted).

The Commission's decision in *G.M.* did not change this precedent surrounding buyer liability for knowingly inducing discriminatory promotional allowances nor the Commission's underlying enforcement policy. In *G.M.*, the Commission declined to extend the *per se*

liability of Subsections 2(d) and 2(e) of the Robinson-Patman Act to a transaction not otherwise prohibited by those subsections. The concept of buyer liability under Section 5 of the FTC Act, however, as explained in *Grand Union,* only imposes liability upon a party to a transaction that is already unlawful under those subsections of the Robinson-Patman Act. That is, *Grand Union* stands for the proposition that both parties to an unlawful transaction may be held liable. In *G.M.,* the Commission merely declined to broaden the class of unlawful transactions.

The Commission also acknowledged the continued applicability of the *Grand Union* line of cases in *G.M.* 103 F.T.C. at 700-01. In the accompanying footnote, the Commission noted that proof of injury is not required in a Section 5 buyer inducement case. *Id.* at 701 n.3.

In view of the Commission's position respecting buyer inducements in *G.M.,* McKesson has not established a changed condition of law that requires reopening the order.

Apparently as a changed condition of fact, McKesson also asserts that this first prohibition of the order is no longer needed because the prohibition is now embodied in a court decree as a result of the civil penalty action. McKesson contends that the Commission is, thus, well-equipped to proceed against future conduct. However, the fact that a federal court has entered a decree to enforce a portion of the Commission's own order is not the type of changed condition of fact that requires reopening the order. Rather, the previous alleged violations leading to the entry of the decree suggest that continuation of the order is appropriate to ensure that McKesson continues to conform its conduct to the law.

McKesson also urges the Commission in the public interest to set aside the prohibition against inducing discriminatory promotional allowances and services because the prohibition places it at a competitive disadvantage. According to McKesson, none of its competitors are subject to such prohibitions, save one. *See Bergen Brunswig Corp.,* Docket No. C–2463, 83 F.T.C. 687 (1973). However, this order provision only prohibits McKesson from violating the law. The order provision does not prohibit any conduct that is currently lawful and McKesson has not demonstrated any other injury flowing from the prohibition. McKesson has not established that it is placed at a competitive disadvantage by an order that requires it to obey the law. *See* Order Modifying Cease and Desist Order Issued July 19, 1951, in *Atlas Supply Co.,* Docket No. 5794, 106 F.T.C. 334, 335 (1985).

In view of this, and because of the continued viability of the *Grand Union* line of cases, the Commission does not believe that setting aside this part of the order would be in the public interest.

C. THE PROHIBITION AGAINST PROVIDING CUSTOMERS MATERIAL INDUCEMENTS TO ATTEND TRADE SHOWS

McKesson also requests the Commission to set aside the prohibition against providing material inducements to customers to attend its trade shows when the amount is dependent upon the customers' volume of purchases. McKesson claims that the paragraph prohibits competitive conduct and, therefore, is contrary to the public interest.

This provision no longer appears to be necessary. Setting aside this paragraph may be warranted because the prohibited conduct has never been *per se* unlawful under Section 5 and is a competitively reasonable method for a wholesale distributor to employ in attracting retailers to attend a trade show. Additionally, there is evidence that the prohibition against material inducements may place McKesson at a competitive disadvantage because its competitors are not bound by a similar prohibition. Of course, Subsection 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), prohibits any price discrimination that injures competition among wholesale distributors.

The Commission has denied that part of McKesson's petition that seeks to reopen on the basis of changed conditions. McKesson has failed to make any showing of changed conditions of law or fact of the type to require such reopening. Likewise, the public interest does not warrant any modification to the prohibition of the knowing inducement of promotional allowances because the paragraph only requires compliance with established case law. However, in the public interest, the Commission has determined to reopen the order and set aside the second paragraph prohibiting material inducements to customers to attend respondent's trade shows.

Accordingly, it is hereby ordered that the proceeding be, and it hereby is, reopened and the following paragraph be set aside as of the date of this order:

It is further ordered, That respondent shall cease and desist from offering or providing to its customers, directly or indirectly, any material inducement, monetary or otherwise, to attend its trade shows whenever such customers' receipt of the inducement depends upon their purchases or volume of purchases of merchandise from respondent.

By direction of the Commission. Chairman Oliver concurred in part and dissented in part. Commissioner Azcuenaga was recused.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

Foremost-McKesson (McKesson), a drug and sundries wholesaler, has petitioned the Commission to vacate a 1973 order that regulates McKesson's conduct in administering druggists' sundries trade shows. The order regulates both McKesson's acceptance of promotional fees, services, and facilities from suppliers who set up booths at the shows, and McKesson's reimbursement of travel and other expenses to retailers who attend the shows.

The Commission concludes, and I agree, that the order should be vacated to the extent it regulates McKesson's reimbursement of retailer travel and other expenses, because continued regulation is not in the public interest. However, the Commission has chosen not to vacate the order's provisions regulating McKesson's acceptance of promotional fees, services, and facilities from suppliers of druggists' sundries. I strongly dissent from this portion of the Commission's decision.

The order's provisions that the Commission refuses to vacate prohibit McKesson from receiving promotional services or facilities from suppliers, or from receiving compensation from suppliers for providing promotional services or facilities, if McKesson knows or has reason to know that similar allowances and services are not available to its competitors on proportionally equal terms. These restrictions are the "buyer side" analogs of Robinson-Patman Act subsections 2(d) and 2(e), which prohibit sellers from offering nonproportional promotional allowances and services to buyers.

As is well known, there is little economic justification for regulating either the offers of services and allowances by sellers (as in subsections 2(d) and 2(e)), or the inducements for services and allowances by buyers (as in the present matter), when neither sellers nor buyers possess substantial market power. Under competitive conditions, sellers face incentives sufficient to ensure that no buyer will face systematic discrimination, or "proportionally unequal" treatment, in any meaningful sense.

Subsections 2(d) and 2(e) of the Robinson-Patman Act would not be quite as troublesome if they incorporated a competitive injury standard requirement.[1] Unfortunately, they do not. As a result, the subsections often increase the costs of doing business, and ultimately force consumers to pay higher prices for goods and services, by making illegal *per se* practices that, in most instances, pose no threat to competition. Even more unfortunately, the Commission has in the

[1] Notably, the American Bar Association has recently suggested that subsections 2(d) and 2(e) be subjected to the competitive injury standard embodied in subsection 2(a). *ABA Favors Competitive Injury Test for Advertising and Promotional Allowances*, 52 Antitrust and Trade Reg. Rep. 357 (Feb. 26, 1987).

past (in the *Grand Union* line of cases) compounded the anti-consumer effects of subsections 2(d) and 2(e) (which regulate conduct of sellers) by using Section 5 to reach an even broader class of cases (conduct of buyers), making it *per se* unlawful for a buyer to induce, or receive allowances and services with knowledge that competing buyers were treated nonproportionally.[2]

The Commission recently provided a persuasive basis for overturning the use of Section 5 to extend the scope of subsections 2(d) and 2(e). In its decision in *General Motors Corp.* ("GM"), the Commission determined that activities not prohibited by the Sherman and Clayton acts should be prohibited under Section 5 only if (1) they have anticompetitive effects very similar to the effects of conduct barred by the pro-competitive portions of those Acts; and (2) if their prohibition is not inconsistent with any other legislative goal reflected in the pro-competitive portions of those Acts.[3]

Thus, the Commission should no longer use Section 5 to extend the Robinson-Patman Act, if the Commission does not consider the Act itself to be pro-competitive. And the Commission clearly does not view the Robinson-Patman Act as pro-competitive; it has characterized the Act as a "protectionist non-efficiency oriented" statute whose objectives conflict rather than coincide with the protection of competition.[4] This condemnation applies most strongly to subsections 2(d) and 2(e) because they do not require any demonstration of competitive injury.

Moreover, in the present matter, there is no evidence or analysis to indicate an exercise of market power, and hence no evidence of an ability to discriminate. Therefore the prohibitions imposed by the order on McKesson are likely only to inhibit McKesson's ability to compete. Clearly, this is inconsistent with the pro-competitive purposes of the Sherman and Clayton Acts.

The Commission was created as an expert body capable of determining when a practice injures competition and when it does not. The Commission did not exercise that expertise in the *Grand Union* line of cases. Instead, it simply extended an inappropriate standard of illegality to an additional class of businesses. The Commission has clear authority to overturn the *Grand Union* line of reasoning. I am unaware of any court decision ordering the Commission to hold as illegal *per se* an inducement by a buyer of what we cast as nonproportional services and allowances. The courts merely have indicated that the Commission may, in its discretion, take that step. But, as a gener-

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[2] *See*, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962); *Giant Food Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

[3] *General Motors Corp.*, 103 F.T.C. 641, 700–701 (1984); *accord. Ethyl Corp.*, 101 F.T.C. 425, 597 (1983), *rev'd on other grounds sub nom. DuPont v. FTC*, 729 F.2d 1288 (2d Cir. 1984).

[4] *General Motors Corp.*, 103 F.T.C. 641, 695–696 (1984), *citing Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 171 n. 39 (1983).

al matter, the Commission has both the primary responsibility and wide discretion to interpret Section 5. Moreover, the Supreme Court has concluded that "as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with ' the broader antitrust policies that have been laid down by Congress.' "[5]

The Commission has elected not to modify the order's buyer inducement provisions. The Commission has thus, to the detriment of American consumers, foregone an opportunity to alter a precedent in an instance where it has the authority to do so. How can the Commission take this action and at the same time claim to serve the interest of American consumers?[6]

Accordingly, although I concur with so much of the Commission's decision as vacates the "seller side" provision, I dissent from the Commission's decision not to vacate the order in its entirety.

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[5] *United States v. United States Gypsum Co.* 438 U.S. 458–459 (1978), *quoting Automatic Canteen Co. v. FTC,* 346 U.S. 61, 74 (1953).

[6] Hint: How can you square a circle?

In the Matter of

AMERCO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9193. Complaint, June 24, 1985—Decision, May 18, 1987

This consent order requires, among other things, a Phoenix, Ariz.-based respondent, U-Haul International, Inc., the nation's largest renter of trucks and trailers, and its Las Vegas, Nev.-based parent company, AMERCO, from initiating or participating in any judicial or administrative proceeding in which their main purpose is to harass or injure any competitor or potential competitor. Additionally, respondents are required for ten years: (1) to give the FTC prior notice before participating in any bankruptcy proceeding of a competitor; (2) to obtain FTC approval before filing a plan of reorganization to acquire a competitor in bankruptcy; (3) to provide the FTC with a copy of any lawsuit filed against a competitor; and (4) to obtain FTC approval before acquiring any competitor worth $5 million or more.

Appearances

For the Commission: *Gerald T. Gregory.*

For the respondents: *Allen Ward, Baker & Hostetler,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that AMERCO, a corporation, and U-Haul International, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITION

1. For the purpose of this complaint, the term *"moving equipment"* shall include trucks, trailers, and/or equipment such as tow bars, hand trucks, hitches, and furniture pads.

RESPONDENTS

2. Respondent AMERCO is a corporation, existing and doing business under the laws of Nevada. Its principal place of business is 3111 Bel Air, Las Vegas, Nevada.
3. For the fiscal year ending March 31, 1984, AMERCO had operating revenues of approximately $626.2 million; profits after taxes of approximately $41.7 million; and assets of approximately $947.3 million.
4. Respondent U-Haul International, Inc. ("UHI") is a corporation, existing and doing business under the laws of Oregon. Its principal place of business is 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.
5. For the fiscal year ending March 31, 1984, UHI had operating revenues of approximately $51.6 million and assets of approximately $33.8 million.
6. AMERCO owns 100 percent of a large number of corporations, including UHI, whose operations relate to the rental of moving equipment. These corporations are collectively referred to herein as "U-Haul." AMERCO has managed and controlled U-Haul since at least 1978 and continues to manage and control U-Haul.
7. UHI is the accounting clearinghouse for and provides technical and advisory services to U-Haul.
8. Respondents AMERCO and UHI maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

TRADE AND COMMERCE

9. There are two types of moving equipment rentals. One type involves only round-trip rentals, in which the moving equipment is returned to the location from which it was taken. The other type involves one-way rentals, in which the moving equipment is returned to a location other than the one from which it was taken. One-way rentals require a network of locations; round-trip rentals require only a single location.
10. The relevant product market ("one-way rental market") is the offering, directly through a network of store locations and/or indirectly through a network of dealer franchise locations, of one-way rentals of moving equipment. The firms (including associations of firms such as U-Haul) in this market purchase, lease, and/or manufacture moving equipment; provide for the maintenance and repair of that equipment; and distribute that equipment to a network of store locations

and/or franchise dealer locations, through which network the one-way rentals are made available to the public.

11. The relevant geographic market is the United States.

12. The United States one-way rental market ("relevant market") is highly concentrated, and entry into it is very difficult.

13. U-Haul has been the dominant firm in the relevant market for at least ten years and continues to dominate that market.

COMPETITION IN THE RELEVANT MARKET

14. Jartran, Inc. ("Jartran"), a Florida corporation, entered the relevant market in 1979. By 1980 it had gained approximately 10% of all revenues generated in the relevant market, and this gain was largely at the expense of U-Haul.

15. U-Haul and Jartran have competed with one another and each with the other firms in the relevant market since approximately 1979, and continue to do so.

16. On or about June 16, 1980, UHI, on behalf of U-Haul and AMERCO, sued Jartran in federal district court in Arizona for false and misleading advertising, seeking approximately $375 million in damages.

17. On or about December 31, 1981, Frank B. Hall & Company ("Hall"), a Delaware corporation, acquired the majority of Jartran's common stock. On or about December 31, 1981, Jartran filed in federal bankruptcy court in Northern Illinois for reorganization under 11 U.S.C. 1101–1174 ("Chapter 11 reorganization").

18. During January 1982, UHI, on behalf of U-Haul and AMERCO, filed a claim in Jartran's Chapter 11 reorganization proceeding for up to approximately $375 million. This claim was based on the damages UHI sought in its then on-going lawsuit against Jartran in Arizona for false and misleading advertising.

ANTICOMPETITIVE ACTS AND PRACTICES

19. During Jartran's Chapter 11 reorganization proceeding, UHI, on behalf of U-Haul and AMERCO, engaged in acts and practices that, in their individual and collective character, were inconsistent with U-Haul's legitimate interests as a creditor, and in fact were intended primarily to delay or prevent Jartran's reorganization as a competitor. Examples of such acts and practices by UHI, on behalf of U-Haul and AMERCO, include the following.

a. On several occasions, UHI proposed that AMERCO acquire Jartran, when UHI and AMERCO knew or had reason to believe that

such an acquisition would probably violate Section 7 of the Clayton Act, 15 U.S.C. 18, or at least would raise serious questions under that Act. Thus, such proposals could probably not be confirmed under the applicable bankruptcy laws, 11 U.S.C. 1101–1174, and could only delay Jartran's reorganization. Representatives of Jartran's unsecured creditors repeatedly requested that UHI seek government clearance of the proposed acquisition, or government comment on its legality, but UHI refused to approach government antitrust agencies for such purposes.

b. UHI opposed a settlement between Hall and certain Jartran creditors, even though this settlement would have effected an increase in the amount of money Jartran would distribute to UHI pursuant to Jartran's reorganization.

c. UHI attempted to void Hall's acquisition of Jartran, although Hall's financial support of Jartran was necessary for Jartran's survival.

d. UHI engaged in such additional acts and practices as (1) instigating, without colorable legal authority, an alter ego proceeding against Hall and a breach of fiduciary duty proceeding against Jartran's Board of Directors, (2) delaying Jartran's reorganization by attempting to have the vote resolicited on a modified reorganization plan, although such resolicitation would be pointless and unnecessary at law because the modified plan had been approved by those Jartran creditors adversely affected by it and because the modified plan made more money available to UHI and certain other Jartran creditors than did the previous reorganization plan, and (3) delaying confirmation of Jartran's reorganization plan through frequent, repetitious, and costly opposition.

20. Certain of the acts and practices, of which examples are set forth in the preceding paragraph, lacked any basis in law; others were not baseless, and were taken under color of law. Even the acts and practices that were not baseless were ultimately dismissed by the court having jurisdiction over the matter or withdrawn by UHI.

EFFECTS AND VIOLATION

21. By means of its anticompetitive acts and practices, respondent UHI, on behalf of U-Haul and respondent AMERCO, has pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition and it has in fact injured competition by jeopardizing and substantially delaying Jartran's emergence as a reorganized company, capable of resuming its role as an effective competitor.

22. The aforesaid acts and practices constitute an attempt by a domi-

nant firm to monopolize the relevant market and constitute unfair methods of competition or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 15th day of August, 1985, A.D., at 10:00 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, Gelman Building, 2120 L Street, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that respondents, U-Haul International, Inc., and AMERCO, are in violation of Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief applicable to each respondent as is supported by the record and is necessary and appropriate including, but not limited to:

1. A prohibition against initiating or participating in any judicial or administrative proceeding not substantially for the purpose pleaded, but primarily to harass or injure any U. S. competitor in the one-way rental of moving equipment (hereinafter, "competitor") or franchise dealer of any competitor;

2. A prohibition against participating in any proceeding initiated under the bankruptcy laws in which any competitor or franchise dealer of any competitor is the debtor; in such a proceeding, a respondent would be free to divest any claim against the competitor or franchise dealer or put that claim in a blind trust or other arrangement in which each respondent's interest as a creditor is represented by legal or other representatives not under its control;

3. A prohibition against initiating or participating in any judicial or administrative proceeding against any competitor or franchise dealer of any competitor without (a) providing the Commission with (1) a copy of the complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in the proceeding, (2) a copy, upon request, of each filing made in the proceeding by each respondent and (3) a complete statement of the factual and legal bases underlying each respondent's initiation of or initial participation in the proceeding; (b) providing the court or tribunal in which the proceeding is being conducted with a copy of the Commission's complaint and order in the instant matter;

4. A prohibition against acquiring, without Commission approval, any competitor or any claim against any competitor;

5. A requirement to (a) distribute a copy of the Commission's complaint and order in this matter to all directors, officers, subsidiaries, and operating divisions, (b) notify the Commission of any material proposed change in a corporate respondent such as dissolution, assignment or sale, (c) file with the Commission a report, in writing, setting forth in detail the manner and form in which respondents have complied with the order issued in this matter and (d) provide the Commission, upon its request during any Commission investigation or litigation concerning respondents' compliance with such order, with

all documents relevant to compliance with the order in this matter, including documents subject to the attorney - client privilege.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent AMERCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business at 3111 Bel Air, Las Vegas, Nevada.

Respondent U-HAUL INTERNATIONAL, INC. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal place of business at 2727 North Central Avenue, P.O. Box 21502, Phoenix, Arizona.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

A. For the purpose of this order, the following definitions shall apply:

1. "*person*" is any natural person, corporate entity (including subsidiaries thereof), partnership, joint venture, trust or legal entity;

2. "*competitor*" is any person or association of persons that offers one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons;

3. "*potential competitor*" is any person or association of persons that either respondent knows or has reason to believe is planning or preparing to offer one-way rentals of moving equipment, directly through a network of store locations and/or indirectly through a network of dealer locations, but does not refer to a dealer or a franchisee or licensee of such a person or association of persons.

B. *It is ordered,* That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from initiating or participating in any judicial or administrative proceeding where such respondent's primary purpose is to harass or injure any competitor or potential competitor.

C. *It is further ordered,* That each respondent, including each of its successors and assigns, directly or indirectly or through any subsidiary, affiliate, division, director, officer, employee, agent, representative, corporation or other device, in connection with the conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, during the period of ten (10) years from date of service of this order, forthwith cease and desist from:

1. participating in any proceeding initiated by a competitor under the Bankruptcy Code, without (a) first giving twenty (20) days written notice to the Federal Trade Commission (or, if fewer than twenty (20) days, written notice shall be given to the Federal Trade Commission as soon as is reasonably practicable under the circumstances), and (b) serving a copy of each pleading filed by either respondent in the proceeding on the Federal Trade Commission by first-class mail at the same time that the pleading is filed;

2. filing or seeking to file in any proceeding initiated by a competitor under the Bankruptcy Code, without the prior approval of the Federal Trade Commission, a plan of reorganization by which either or both respondents would acquire the whole or any part of the stock, share capital, assets or equity interest of such competitor;

3. initiating or participating in any judicial or administrative proceeding against any competitor without providing the Federal Trade Commission (a) within ten (10) days of filing the complaint, petition, or pleading in question, a copy of that complaint, petition, or pleading that each respondent filed to initiate or to initiate participation in such a proceeding, and (b) within twenty (20) days of receiving a request from the Federal Trade Commission for such a statement, a statement of the factual and legal bases underlying each respondent's reasons for the initiation of or initial participation in such a proceeding; provided, however, that this subparagraph C.3 shall not apply to any insurance subrogation claim for personal injury or for damage to property.

D. *It is further ordered,* That each respondent, including each of its successors and assigns, directly or indirectly, during the period of ten (10) years from the date of service of this order:

1. shall not acquire from any person any claim or right under any claim such person has against a competitor, other than by means of insurance subrogation to any claim for personal injury or for damage to property;

2. shall not acquire, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, or equity interest in any competitor; provided, however, that nothing in this subparagraph D.2 shall prohibit respondents from:

a. acquiring any assets the total value of which in any single acquisition is less than five million dollars ($5,000,000), or

b. entering into any transaction with any subsidiary or affiliate of either respondent, with any company wholly developed by either respondent, or with any noncompetitor, where such transaction involves the conduct of business, including mergers, consolidations, joint ventures, or other reorganizations, solely with or among these entities.

E. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, respondents, including their successors and assigns, shall distribute a copy of the Federal Trade Commission's Complaint and Order to: (1) respondents' directors and officers and their successors, (2) respondents' in-house counsel and their successors, (3) respondents' auditor and its successors, (4) AMERCO District Vice Presidents and their successors, and (5) respondents' outside counsel in any judicial or administrative proceeding involving a competitor, other than a proceeding based on an insurance subrogation claim for personal injury or for damage to property. Respondents shall make their initial distribution under this paragraph E within thirty (30) days of date of service of this order.

F. *It is further ordered,* That respondents, including their successors and assigns, shall:

1. file with the Federal Trade Commission within ninety (90) days of date of service of this order a report in writing setting forth in detail the manner and form in which respondents have complied and are complying with this order;

2. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed change in the corporation which may affect compliance obligations arising out of this order.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

In June, 1985, the Commission issued the complaint in this matter. It alleged, *inter alia,* that the respondents "pursued a deliberate course of action to abuse the judicial process in order to injure a competitor and competition." I agree that the Commission had a reason to believe that the respondents had violated section 5 of the Federal Trade Commission Act when the complaint was issued. I also agree that the proposed consent order should prevent the conduct alleged in the complaint.

I have two concerns with the proposed consent order. First, I do not believe that it should prohibit the respondents from making certain acquisitions without securing prior Commission approval. In my view, an order should, in general, be directed to the wrongdoing alleged. In the present case, it is difficult to justify a prior approval provision because the complaint does not allege that the respondents made an acquisition that violated section 7 of the Clayton Act. Second, I believe that the entire order—rather than simply certain sections—should terminate after ten years.

Notwithstanding these reservations, I have voted to accord final approval to the proposed consent order. On balance, I am of the opinion that the litigation should at this time be brought to a close.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I support the majority's decision to give final approval to the consent agreement. I do so because I am persuaded that there is reason to believe U-Haul engaged in sham litigation against a competitor in an attempt to monopolize the market for one-way truck and trailer rentals. Moreover, I am persuaded that the consent order provides an effective and, for the most part, appropriate remedy for the conduct alleged.

My only reservation about the order stems from its inclusion of a ten-year prior approval requirement for asset acquisitions with a total value of at least $5 million. The theory of the case is not that U-Haul sought to monopolize the market by acquiring competitors but that sham litigation, including sham proposals by U-Haul to acquire Jartran as part of reorganization plans, was undertaken for that purpose. Therefore, I question the relevance of the prior approval requirement to the violations alleged. Moreover, the $5 million asset threshold for competitive concern has not been adequately justified. For these reasons, I would have preferred that the prior approval requirement be deleted from the consent order.

IN THE MATTER OF

THE ADVERTISING CHECKING BUREAU, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2947. Consent Order, Jan. 4, 1979—Set Aside Order, May 19, 1987

The Federal Trade Commission has set aside a 1979 consent order with The Advertising Checking Bureau, Inc. (93 F.T.C. 4), thus removing restrictions on respondent's involvement in cooperative advertising programs.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON JANUARY 4, 1979

On January 16, 1987, The Advertising Checking Bureau, Inc. ("ACB") filed its Petition to Reopen Proceeding And To Set Aside Consent Order ("Petition"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, requesting that the Commission set aside the order in Docket No. C-2947, issued on January 4, 1979.[1] ACB's petition was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that ACB violated section 5 of the Federal Trade Commission Act by auditing price restrictive cooperative advertising programs. ACB's conduct, as alleged in the complaint, had the effect of fixing or "illegally influencing" the resale prices of dealers selling ACB's clients' merchandise and eliminating intrabrand competition. It is clear that the complaint challenging ACB's conduct applied a *per se* rule of illegality. The order prohibits ACB from "designing, implementing, conducting, administering or auditing" any cooperative advertising program that conditions the right of any dealer to obtain cooperative advertising allowances or credits because the dealer, among other things, sells or advertises merchandise at a discount or sale price.[2]

In its petition, ACB asserts that the order's prohibitions hinder ACB's efforts to compete with cooperative advertising auditing firms not subject to the order's constraints. ACB states that setting aside

[1] ACB also requests the Commission to withdraw the Commission's "Policy Statement Regarding Price Restrictions In Advertising Programs" ("Policy Statement"), 4 Trade Reg. Rep. (CCH) ¶39,057 (October 26, 1981), issued on June 27, 1980. In conjunction with the issuance of this order, the Commission is also withdrawing its policy statement.

[2] The order does not bar ACB from auditing cooperative advertising programs that restrict any dealer's right to obtain cooperative advertising allowances for the advertising of "closeouts," "irregulars" or "seconds."

the order would enable ACB to become a more effective competitor. ACB also argues that the restraints prohibited by the order are generally procompetitive or competitively neutral. ACB also states that the restraints covered by the order do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds. ACB would like the Commission to set aside the order because "there is no rational economic basis for the order and no sound legal justification exists for its continuation."

Based on the information provided by ACB, and other available information, the Commission has concluded that ACB has made a satisfactory showing that the public interest requires reopening the proceeding in Docket No. C–2947 and setting aside the order. The Supreme Court's decisions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) make it clear that the rule of reason should be applied in determining whether nonprice vertical restraints unreasonably restrain competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. *See Monsanto,* 465 U.S. at 764. The fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful.

The cooperative advertising practices prohibited by the order in this case would not by themselves constitute agreements to fix resale prices. Although such restrictions may in some cases reduce a dealer's incentive to cut prices, the restraints do not prevent the dealer from selling at discount prices or even from advertising discount prices at the dealer's own expense. Moreover, price restrictive cooperative advertising programs are likely to be procompetitive or at least competitively neutral in most cases by, for example, lowering the manufacturer's costs of monitoring retailer compliance with other, seemingly unrelated, cooperative advertising restrictions or channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. ACB's Petition at 5–9. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition.

Based on the record, the Commission believes that there is no evidence that price restrictive cooperative advertising programs, standing alone, are sufficiently likely to be harmful that a flat ban, rather than a case-by-case inquiry, is appropriate. The practices prohibited by the order do not appear to be ones that would always or almost always tend to restrict competition and decrease output and, thus, do not warrant summary condemnation. *Broadcast Music, Inc. v. CBS,*

441 U.S. 1 (1979). In sum, the impediments to effective competition resulting from the order outweigh any reasons to retain the order.

In light of the foregoing, continuation of the order against ACB is no longer justified and would not be in the public interest because its application harms ACB's ability to administer cooperative advertising programs that are likely to be lawful even though they contain restrictions on the prices advertised. Absent evidence that ACB is knowingly helping to enforce resale price maintenance agreements, any prosecution of cooperative advertising restrictions under the rule of reason would more properly be directed against ACB's clients rather than against ACB.

Accordingly, *it is ordered* that the order of January 4, 1979, in Docket No. C–2947 be, and it hereby is, set aside.

By direction of the Commission, Commissioner Bailey dissenting. Commissioner Strenio did not participate.

IN THE MATTER OF

PLAS-TIX USA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3213. Complaint, June 5, 1987—Decision, June 5, 1987

This consent order prohibits, among other things, a Miamisburg, Ohio manufacturer of lighter-to-lighter automobile battery chargers from claiming that the chargers are jumper cables or that they can restart a disabled vehicle as quickly as jumper cables. Also, respondent is required to make specified disclosures on its packaging and in advertisements for a period of five years.

Appearances

For the Commission: *Allen Hile.*

For the respondents: *Joseph A. Koenig, Turner, Granzow, & Hollenkamp,* Dayton, OH.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Plas-Tix USA, Inc., hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Plas-Tix USA, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 510 South Riverview, Miamisburg, Ohio.

PAR. 2. Respondent is now and for sometime in the past has been engaged in the manufacturing, marketing, distributing, advertising, offering for sale, and selling to the public of "Safe-T-Start" and other lighter-to-lighter chargers, which are devices to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles.

PAR. 3. In the course and conduct of its business, respondent causes, and in the past has caused Safe-T-Start and other lighter-to-lighter chargers to be offered and sold from its place of business to purchasers

located in various States of the United States and the District of Columbia. Respondent maintains and, at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act, as amended.

PAR. 4. In the further course and conduct of its aforesaid business, respondent has at all times mentioned herein made numerous statements in writing, in various product packaging and promotional materials and instruction sheets prepared and/or disseminated by respondent for use in selling respondent's products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid is the following:

"safe - sensible - JUMPER CABLES"

PAR. 5. Through the use of the statement referred to in Paragraph Four, and others contained in product packaging and promotional materials, instruction sheets, and advertisements, not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

a. Lighter-to-lighter chargers are jumper cables; and

b. Lighter-to-lighter chargers can restart a disabled vehicle as quickly as jumper cables.

PAR. 6. In truth and in fact:

a. Lighter-to-lighter chargers are not jumper cables;

b. Lighter-to-lighter chargers cannot restart a disabled vehicle as quickly as jumper cables. Lighter-to-lighter chargers take significantly longer than jumper cables to restart a vehicle, even under the most favorable circumstances.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. In the further course and conduct of its aforesaid business, respondent has at all times mentioned herein made numerous statements in writing, in various product packaging and promotional materials and instruction sheets prepared and/or disseminated by respondent for use in selling respondent's products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid is the following:

"Start engine of vehicle with good battery and just let it idle for the amount of time indicated below:

(1) 5 minutes (if engine in vehicle with dead battery turned slowly, but wouldn't start)

(2) 10 minutes (if clicking sound was heard when trying to start vehicle with dead battery)

(3) 15 minutes (if no sound was heard when trying to start vehicle with dead battery)

(4) 20–25 minutes (if headlights did NOT burn on vehicle with dead battery)"

PAR. 8. Through the use of the statements referred to in Paragraph Seven, and others contained in product packaging and promotional materials, instruction sheets, and advertisements not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that the times stated as required to recharge a battery in the four listed stages of discharge are typical times.

PAR. 9. Through the use of the statements referred to in Paragraph Seven, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representation set forth in Paragraph Eight it possessed and relied upon a reasonable basis for that representation.

PAR. 10. In truth and in fact, at the time respondent made such representation it did not possess and rely upon a reasonable basis for that representation. Therefore, the representation set forth in Paragraph Nine was, and is, false and misleading.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules;

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Plas-Tix USA, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 510 South Riverview, Miamisburg, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For the purpose of this order,

a. "*lighter-to-lighter charger*" means any device to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles;

b. "*distributor*" means any person who purchases or receives on consignment from Plas-Tix lighter-to-lighter chargers for resale;

c. "*dealer*" means any person who purchases, or receives on consignment from a distributor, lighter-to-lighter chargers for resale to the public; and

d. "*person*" means any individual, partnership, corporation, firm, trust, estate, cooperative, association, or other entity.

I.

It is ordered, That respondent Plas-Tix USA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of Safe-T-Start or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. that any such lighter-to-lighter charger is a jumper cable;

b. that any such lighter-to-lighter charger can restart a disabled vehicle as quickly as jumper cables;

c. that any such lighter-to-lighter charger can recharge a battery in any specified length of time, unless:

1. the representation is accompanied by a clear and prominent statement disclosing whether the specified time is a maximum, minimum, typical, or other such time, and that older batteries or colder temperatures may increase charging times; and

2. at the time the representation is made, respondent possesses and relies upon a reasonable basis for the representation which shall consist of competent and reliable evidence which substantiates such representation; provided, however, that to the extent such evidence of a reasonable basis consists of any scientific or professional test, experiment, analysis, research, study or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" for purposes of this paragraph only if the test, experiment, analysis, research, study, or other evidence is conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

d. any performance characteristic of any lighter-to-lighter charger unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis for the representation which shall consist of competent and reliable evidence which substantiates such representation; provided, however, that to the extent such evidence of a reasonable basis consists of any scientific or professional test, experiment, analysis, research, study or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" for purposes of this paragraph only if the test, experiment, analysis, research, study, or other evidence is conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

II.

It is further ordered, That respondent Plas-Tix USA, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of the Safe-T-Start or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith and for a period of five (5) years from the date of this order cease and desist from failing to disclose clearly and conspicuously on the packaging of each such lighter-to-lighter charger and clearly and prominently in each solicitation for the sale of such lighter-to-lighter charger either:

(a) the following information expressed in the exact language set forth below in ten point or larger bold face type:

"This product is not a jumper cable and will not instantly start your car. It must first recharge your battery. Older batteries or colder temperatures may increase charging times. Consult the operating instructions for charging times." or

(b) the specific length of time required to recharge a battery, accompanied by a statement disclosing whether the specified time is a maximum, minimum, typical, or other such time, and that older batteries or colder temperatures may increase charging times.

III.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall within thirty (30) days after the date of service of this order:

a. provide each distributor with labels which contain the disclosure required by Part II of this order in ten point or larger bold face type in sufficient quantity to cover the existing inventory of Safe-T-Start and other lighter-to-lighter chargers manufactured by Plas-Tix of:

(1) the distributor; and

(2) each dealer who purchased or received on consignment Safe-T-Start or other lighter-to-lighter chargers from such distributor; and

b. instruct each distributor to affix, and use its best efforts to ensure that each distributor affixes, the label described in Part III a of this order to the packaging of each Safe-T-Start or other lighter-to-lighter charger manufactured by Plas-Tix that is in the inventory of that distributor, and to each such lighter-to-lighter charger in the inventory of each dealer who purchased or received on consignment Safe-T-Start or other lighter-to-lighter chargers manufactured by Plas-Tix from such distributor.

IV.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall distribute a copy of this order to each present and future officer, employee, agent and representative having sales, advertising, or policy making responsibilities for any lighter-to-lighter charger and secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That Plas-Tix USA, Inc., its successors and assigns, shall maintain for at least three years and upon request make available to the Federal Trade Commission for inspection and copying the originals of signed statements required by Part IV of this order and copies of all test results, data, and other documents or information relied upon for any representation for any lighter-to-lighter charger and any information in the possession of Plas-Tix which contradicts, qualifies or calls into serious question that representation.

VI.

It is further ordered, That respondent Plas-Tix USA, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail, the manner and form in which it has complied with this order.

IN THE MATTER OF

WALGREEN CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3214. Complaint, June 10, 1987—Decision, June 10, 1987

This consent order prohibits, among other things, a Deerfield, Ill.-based retail drugstore chain from making unsubstantiated advertising claims for "Advil" pain reliever or any other over-the-counter analgesic drug product.

Appearances

For the Commission: *Donna S. Moffa.*

For the respondents: *Robert L. Wald and Robert A. Skitol, Wald, Harkrader, & Ross,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Walgreen Co., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Walgreen is an Illinois corporation with its principal office or place of business located at 200 Wilmot Road, Deerfield, Illinois.

PAR. 2. Walgreen offers for sale and sells over-the-counter drug products.

PAR. 3. Walgreen has disseminated or caused to be disseminated, advertisements for over-the-counter drug products, which products are "drugs" within the meaning of that term in Section 12 of the Federal Trade Commission Act. These advertisements have been disseminated by various means in or affecting commerce, including newspapers distributed across state lines and radio broadcasts transmitted across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of drugs.

PAR. 4. The acts and practices of Walgreen alleged in this complaint have been in or affecting commerce.

PAR. 5. Typical of Walgreen's advertisements, but not necessarily inclusive thereof, are the Walgreen advertisements attached hereto

as Exhibits A through E. Specifically, the aforesaid Walgreen advertisements contain the following statements:

a. "Prescription Pain Reliever . . . without a prescription! ADVIL is 200 mg. Ibuprofen for pain. One of the most prescribed pain relievers. Anti-inflammatory and analgesic comfort for people with arthritis." (Exhibit A)

b. "Now available without prescription. Advanced 'ADVIL' . . . . Non-narcotic anti-inflammation Ibuprofen 200 mg. for pain relief." (Exhibit B)

c. "ADVIL. Generic equivalent of Motrin, No prescription necessary." (Exhibit C)

d. "An anti-inflammatory and an analgesic, ADVIL is a source of comfort for people who experience arthritis pain." (Exhibit D)

e. "One of the world's *most-prescribed* pain relievers—known to millions as Ibuprofen —is now available *without* a prescription, at Walgreens! . . . . *ADVIL* . . . a highly effective, non-narcotic, anti-inflammatory pain reliever." (Exhibit E)

PAR. 6. Through the use of the statements referred to in Paragraph Five (a) through (e), and other statements in advertisements not specifically set forth herein, Walgreen has made the following material representations, directly or by implication:

a. Consumers can substitute "Advil," in over-the-counter dose levels, for prescription ibuprofen, because when so substituted, "Advil" provides all of the same therapeutic benefits to consumers as prescription ibuprofen.

b. "Advil," in over-the-counter dose levels, provides an anti-inflammatory benefit to consumers.

PAR. 7. Through the use of the statements set forth in Paragraph Five, and others not specifically set forth herein, Walgreen has represented, directly or by implication, that at the time of making the representations set forth in Paragraph Six it possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations set forth in Paragraph Six and each subsequent dissemination, Walgreen did not possess and rely upon a reasonable basis for making such representations. Therefore, Walgreen's representation set forth in Paragraph Seven was and is false and misleading.

PAR. 9. The acts or practices of Walgreen, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Chairman Oliver was recorded as voting in the negative.

EXHIBIT A

Myadec
7.99
SALE priced
Myadec Vitamins
High potency supplement with minerals for adults. Includes Zinc. Value pack of 100 plus 30 tablets.
Prescription Pain Reliever without a prescription!
ADVIL is 200 mg. Ibuprofen for Pain
• One of the most prescribed pain relievers
• Anti-inflammatory and analgesic comfort for people with arthritis
In quantities of 24 tablets, 50 or 100 tablets.
Advil
6.99
SALE priced
Natural Fiber Laxative by Metamucil
Gentle powder in regular, strawberry or orange flavor. 21 oz.
Metamucil
250
Sweet'N Low
2.19
SALE priced
Sweet'N Low, 250's
Packets of low-cal granulated sugar substitute.
Senokot
RELIEVES
CONSTIPATION
7.99
SALE priced
Senokot Laxative Tabs, 100's
Natural vegetable formula gently relieves constipation.
LOSE WEIGHT
SUPER ODRINEX
3.99
SALE priced
Maximum Strength Super Odrinex
Diet plan tablets. 50's.
4.99
SALE priced
Slim-Fast Diet Plan Packets
Chocolate flavor 1 oz. 8's.
Slim-Fast
Walgreens Coupon
Gillette TRAC II
GILLETTE TRAC II, 5's
Walgreens Coupon
AIR FOAM NEEDLES
Walgreens

EXHIBIT B

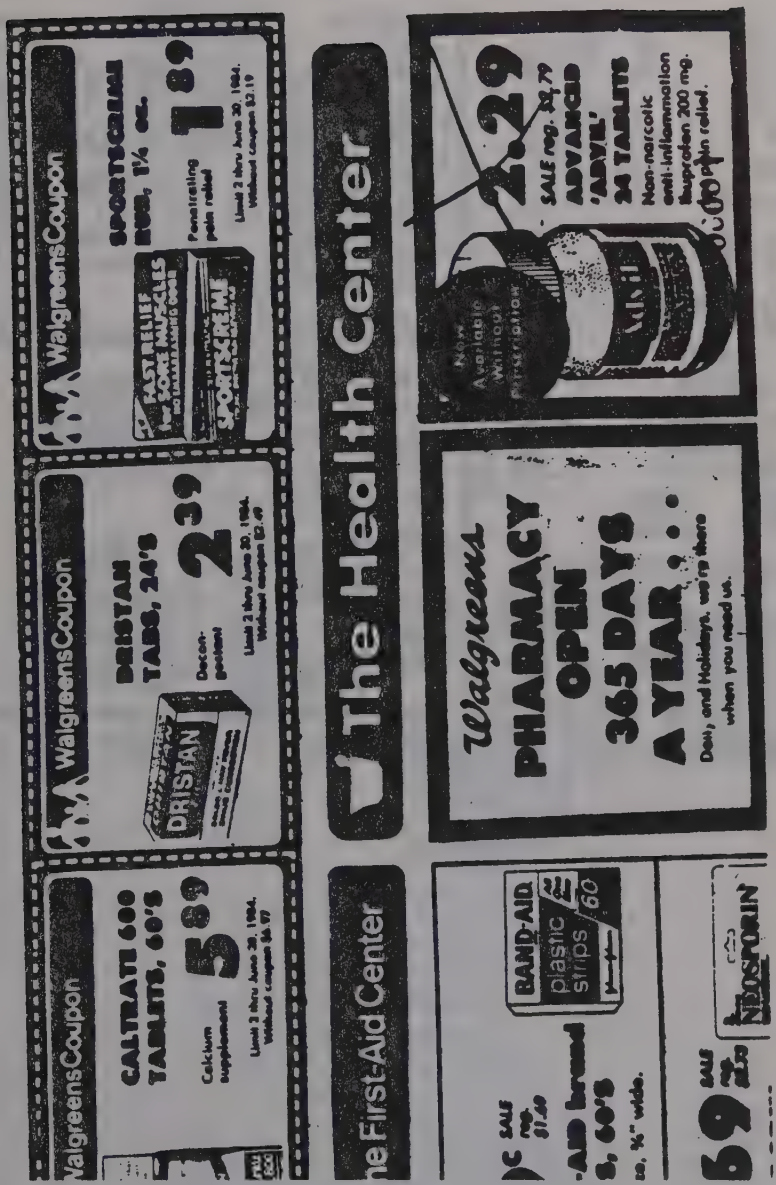
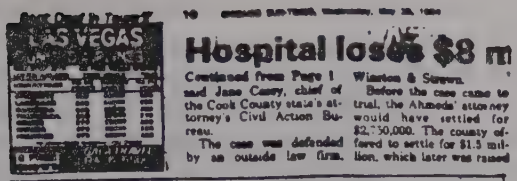


EXHIBIT B

EXHIBIT C

EXHIBIT C

EXHIBIT D



LAS VEGAS

Hospital loses $8 m

Continued from Page 1

said Jane Casey, chief of the Cook County state's attorney's Civil Action Bureau.

The case was defended by an outside law firm, Winston & Strawn.

Before the case came to trial, the Ahmeds' attorney would have settled for $2,750,000. The county offered to settle for $1.5 million, which later was raised

One of the world's most prescribed pain relievers

IBUPROFEN 200 mg.
now available
without prescription
at Walgreens

INTRODUCING

Advil
advanced medicine
for pain

Advil is Ibuprofen specially formulated for use without prescription*

Advil comes in quantities of 24 tablets, 50 or 100

An anti-inflammatory and an analgesic, Advil is a source of comfort for people who experience arthritis pain.

Non-narcotic Advil offers effective relief for the discomfort of headache, common colds, toothache, muscle pain and cramps. It helps to reduce fever.

First there was aspirin.
Now there is Advil.

Walgreens The Health Center

EXHIBIT D

EXHIBIT E

renADa

Advertising 200 Wilmot Road, Deerfield, IL 60015 Phone 312-940-2900

ADIO
OPY

CLIENT WALGREENS/SLIM-FAST DATE 5/22/84

JOB DESCRIPTION :60 Radio - "Advil & Slim-Fast"

Script # WLG-270-60 THURSDAY & FRIDAY

DATE | WALGREENS MUSIC BED #69 UNDER ANNCR

STATION ANNCR
WITH MUSIC UNDER:

NOTE

PROFEN IS PRONOUNCED
"IBE-BYOO-PRO-FENN"

Here's good news for pain sufferers. One of the world's most-prescribed pain relievers-- known to millions as Ibuprofen -- is now available without a prescription, at Walgreens! Now you can buy it under the brand name ADVIL -- spelled A-D-V-I-L -- ADVIL for the temporary relief of minor arthritis pain ... headaches and toothaches ... muscle and backaches ... and menstrual cramps. ADVIL ... a highly effective, non-narcotic, anti-inflammatory pain reliever. ADVIL ... now available without a prescription, at Walgreens!

And say, how many times have you tried to lose weight? If the answer is "too many", better get SLIM-FAST at Walgreens! You won't find a more delicious, tasty way to lose weight. SLIM-FAST gives you a real chocolate-tasting shake ... a tempting vanilla ... a chocolate pudding you can really sink your teeth into ... and a rich, creamy hot cocoa. Every SLIM-FAST weight-loss meal is complete with vitamins, minerals, protein, fiber and bran. And the SLIM-FAST Diet practically counts the calories for you. Get SLIM-FAST now. Pickup SLIM-FAST at Walgreens, today!

...(s) ...ed/Dated _____ at his/her/their/ad address

_____ each for _____ announcements, for a total of $ _____

_____ each for _____ announcements, for a total of $ _____

_____ each for _____ announcements, for a total of $ _____

Signature of Station Official

(Notarize Above) Type Name and Title Station

EXHIBIT E

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Walgreen, Co. is a corporation organized, existing and doing business under an by virtue of the laws of the State of Illinois, with its office and principal place of business located at 200 Wilmot Road, Deerfield, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Walgreen Co., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin" or any other over-the-coun-

ter analgesic drug product, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication:

A. That any such product can be substituted by consumers, in over-the-counter dose levels, for a prescription form of the product, because when so substituted such product provides all of the same therapeutic benefits to consumers as the FDA-approved label indications for the prescription form of the product, unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

B. That any such product provides anti-inflammatory benefits for arthritis or other conditions unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

II.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin," any other over-the-counter analgesic drug product containing ibuprofen, or any other analgesic drug product existing simultaneously in over-the-counter and prescription forms, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, that any such product is efficacious for any purpose unless at the time of making the representation respondent possesses and relies upon a reasonable basis substantiating such representation. Except as otherwise permitted by the

provisions of paragraph IV hereinbelow, such reasonable basis shall consist of at least two adequate and well-controlled double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to conduct such studies.

III.

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Advil," "Nuprin" or any other over-the-counter analgesic drug product containing ibuprofen, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, directly or by implication, any performance characteristic of any such product (other than those covered by paragraphs I and II hereinabove) unless at the time of making the representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence which substantiates such representation. Except as otherwise permitted by the provisions of paragraph IV hereinbelow, evidence shall be considered "competent and reliable" only if it consists of tests, experiments, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

IV.

The following provisions apply to paragraphs I through III of this order:

A. The term "analgesic drug product" means an oral dosage form of drug as to which the label indications for over-the-counter use are limited to the relief or reduction of pain, inflammation and/or fever.

B. If FDA promulgates any final standard or any FDA Advisory Review Panel has in effect findings and conclusions establishing that such representation is true, such final standard or findings and conclusions (as long as they remain in effect) shall also constitute a reasonable basis for such representation.

V.

It is further ordered, That respondent, its successors and assigns, for at least three (3) years after the date of the last dissemination of the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying:

1. All materials possessed and relied upon to substantiate any claim or representation covered by this order.

2. All test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict, qualify or call into question any representation covered by this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver was recorded as voting in the negative.

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3191. Complaint, June 25, 1986—Decision, June 25, 1986[1]

This consent order, among other things, allows Occidental Petroleum Corp. to proceed with its tender offer for MidCon Corp. and their subsequent merger. Respondent is required to divest MidCon's subsidiary, Mississippi River Transmission Corp. (MRT), within one year after the order becomes final. Additionally, respondent and its subsidiary, Cities Service Oil and Gas Corp., is prohibited from entering into any new agreements to sell natural gas to MRT until the divestiture is completed.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *Gerald M. Stein, Occidental Petroleum Corp.*, Los Angeles, CA. and *Paul E. Goldstein, MidCon Corp.*, Lombard, IL.

COMPLAINT

The Federal Trade Commission having reason to believe that respondent Occidental Petroleum Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent MidCon Corp., in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. "*Occidental*" means Occidental Petroleum Corporation, its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each

[1] This matter was inadvertently omitted from the Federal Trade Commission Decisions-Volume 107.

partnership, joint venture, joint stock company or concession in which Occidental is a participant.

b. "*MidCon*" means MidCon Corp., its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which MidCon is a participant.

c. "*The acquisition*" means the transaction described, in whole or in part, in paragraph 10 of this complaint.

d. "*Transportation*" means transportation for one's own account as well as for others.

II. RESPONDENTS

A. Occidental

2. Respondent Occidental is a corporation organized and doing business under the laws of the state of California with its principal place of business located at 10889 Wilshire Boulevard, Los Angeles, California.

3. Respondent Occidental is the parent of a group of companies engaged primarily in the production and marketing of oil, gas and coal and in the manufacture and sale of chemicals and agricultural products.

4. In 1984, respondent Occidental had net sales of $15.6 billion. Occidental is a major producer of natural gas in the United States. In 1984, Occidental produced approximately 248 billion cubic feet of natural gas.

5. At all times relevant herein, respondent Occidental has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. MidCon

6. Respondent MidCon is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 701 East 22nd Street, Lombard, Illinois.

7. Respondent MidCon owns businesses that operate at several levels in the natural gas transportation industry. MidCon had sales of $4.1 billion in the fiscal year ending September 30, 1985. As of September 30, 1985, MidCon owned and operated natural gas pipeline systems in the United States consisting of over 29,000 miles of pipe-

line. MidCon also owned and operated various other natural gas gathering and transmission facilities.

8. Among the pipeline companies owned by respondent MidCon is Mississippi River Transmission Corporation ("MRT"). MRT is an interstate pipeline that runs from Texas and Louisiana to the St. Louis, Missouri area. Approximately 93 percent of MRT's gas sales were made in the St. Louis area in 1984.

9. At all times relevant herein, respondent MidCon has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

10. On December 31, 1985 respondent Occidental and respondent MidCon entered into a merger agreement whereby Occidental agreed to initiate a cash tender offer of $75 per share for up to 21,000,000 shares, approximately 54 percent of MidCon's stock. The agreement further provides that, subsequent to the successful completion of the tender offer, Occidental will consummate the merger by exchanging either $75 or 2.2472 shares of Occidental stock for each of the remaining MidCon shares. The total value of the transaction is approximately $3 billion.

IV. RELEVANT MARKETS

11. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation by pipeline of natural gas into consuming areas.

12. Another relevant line of commerce in which to evaluate the effects of the acquisition is the sale of natural gas into consuming areas.

13. One relevant section of the country is the St. Louis area, consisting of that part of Missouri containing St. Louis city and Franklin, Jefferson, St. Charles and St. Louis counties and the part of Illinois containing Clinton, Jersey, Madison, Monroe and St. Clair counties.

V. EFFECTS

14. Respondent MidCon, through its MRT and Natural Gas Pipeline Company of America (NGPL) subsidiaries, is the sole supplier of natural gas to the St. Louis area. In 1985, MidCon supplied 100 percent of

the natural gas consumed in the St. Louis area. In 1985, MRT supplied 100 percent of the natural gas purchased by LaClede Gas Company, the local distribution company for and sole supplier of gas to the city of St. Louis, Missouri.

15. MRT is the only company that owns a pipeline for the transmission of natural gas into the city of St. Louis, Missouri.

16. It is difficult to enter into the business of transporting by pipeline and selling natural gas in the St. Louis area.

17. For the reasons set forth in paragraphs 11 through 16, respondent MidCon has market power in the transportation by pipeline of natural gas and the sale of natural gas into the St. Louis area.

18. Interstate natural gas pipelines are subject to regulation by the Federal Energy Regulatory Commission (FERC) under the authority of the Natural Gas Act, 15 U.S.C. 717w, and Natural Gas Policy Act, 15 U.S.C. 3301–3432. MRT is among the pipelines regulated by the FERC. The FERC regulates the rates charged by interstate pipelines, including MRT, for the transportation of natural gas and the sale of natural gas for resale (sales to local distribution companies). The FERC's review and regulation of these rates is based upon a pipeline's cost of service. To a degree, this regulation constrains the prices and profits of MRT.

19. Some natural gas production and sale at the wellhead is regulated pursuant to the Natural Gas Act and the Natural Gas Policy Act. By operation of the Natural Gas Policy Act, many categories of natural gas production were deregulated on January 1, 1985. 15 U.S.C. 3331(a). At the present time, most natural gas production is deregulated. Pipelines purchase deregulated natural gas at prices negotiated with producers. The portion of natural gas production that is deregulated will increase over time as production from regulated wells declines.

20. The FERC regulates an interstate pipeline's rates based upon the pipeline's costs. If FERC does not disallow an increase in these costs, it would allow the pipeline to charge higher rates. When a pipeline with market power over transportation of natural gas or the sale of natural gas into consuming areas purchases natural gas from an unregulated producing affiliate, there is an incentive to pay higher prices for natural gas. Such transactions between regulated and unregulated affiliate companies present a recognized means of seeking to circumvent rate-of-return regulation covering the regulated affiliate.

21. By combining a major natural gas producer (respondent Occidental) with an interstate gas transmission pipeline with market power in the transportation of natural gas or the sale of natural gas into consuming areas (MRT), the acquisition substantially increases

the potential for MRT to purchase its gas supplies from affiliated producing companies. The acquisition thereby is likely to increase the ability and the incentive of MRT to purchase its supplies of deregulated natural gas in the field from affiliated companies at higher prices than it would have been willing to pay absent the acquisition of respondent MidCon by respondent Occidental. Because some such increase in costs is likely to be permitted, MRT would likely be able to charge higher rates than it would have absent the purchases of natural gas at higher prices from Occidental's affiliated gas producing entities. Prices to customers of MRT would be likely to rise.

22. By increasing the amount of gas MRT purchases from producing affiliates, the acquisition is likely to increase the incentive and ability of MRT to pay high prices to producing affiliates.

23. Under FERC regulations, MidCon is under no obligation to transport gas for others, and as a result can bar access by third parties wishing to sell gas into the St. Louis area.

24. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation by pipeline of natural gas and the sale of natural gas into the St. Louis area in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. the acquisition will create the incentive and ability for respondent MidCon to raise the price and reduce the sales of natural gas in the St. Louis area; and

b. the acquisition will create an additional incentive for respondent MidCon to refuse to transport lower priced natural gas for others into the St. Louis area.

VI. VIOLATION CHARGED

25. The proposed acquisition of the stock and assets of MidCon by Occidental, as set forth in paragraph 10 herein, violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of Occidental Petroleum Corporation's ("Occidental") acquisition of shares of Common Stock of MidCon Corp. ("MidCon") and the subse-

quent merger of MidCon into an affiliate of Occidental pursuant to an Agreement and Plan of Reorganization, and Occidental and MidCon, having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission would charge Occidental and MidCon with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Occidental and MidCon, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Occidental is a corporation organized under the laws of California with its executive office at 10889 Wilshire Boulevard, Los Angeles, California.

2. MidCon is a corporation organized under the laws of Delaware with its executive office at 701 East 22nd Street, Lombard, Illinois.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Occidental and MidCon, and the proceeding is in the public interest.

Order

I.

It is hereby ordered, That as used in this order the following definitions shall apply:

1. "*Acquisition*" means Occidental's acquisition of shares of the Common Stock of MidCon and the subsequent merger of MidCon into

an affiliate of Occidental pursuant to an Agreement and Plan of Reorganization.

2. "*MRT*" means Mississippi River Transmission Corporation, an indirect, wholly-owned subsidiary of MidCon.

3. "*Occidental*" means Occidental Petroleum Corporation, its subsidiaries, divisions, groups and affiliates controlled by Occidental and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

4. "*MidCon*" means MidCon Corp. as it was constituted prior to the acquisition, including its parents, subsidiaries, divisions, groups and affiliates controlled by MidCon, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

II.

It is further ordered, That:

(A) Within 12 months of the date this order becomes final, Occidental shall divest, absolutely and in good faith, MRT.

B. Divestiture of MRT shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the MRT is to ensure the continuation of MRT as an ongoing, viable enterprise engaged in the same business in which it is presently engaged and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. So long as Occidental shall own MRT, Occidental and its subsidiary, Cities Service Oil and Gas Corporation, shall not enter into any new agreement(s) for sale of natural gas to MRT.

III.

It is further ordered, That:

A. If Occidental has not divested the MRT within the 12–month period, Occidental shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45 (*1*), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, Occidental shall consent to the appointment of a trustee by the Commission pursuant to this order.

B. If a trustee is appointed by a court or the Commission pursuant to paragraph III(A) of the order, Occidental shall consent to the fol-

lowing terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Occidental's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission, and if the trustee was appointed by the court, subject also to the prior approval of the court. If, however, at the end of the 18–month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of MRT and Occidental shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Occidental shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II(B). If bona fide offers are received by the trustee from more than one prospective purchaser, the Commission shall determine whether to approve each such purchaser, and the trustee shall divest to the purchaser elected by Occidental from among the purchasers approved by the Commission.

5. The trustee shall serve at the cost and expense of Occidental on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Occidental and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on commission arrangement contingent on the trustee divesting MRT.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, Occidental shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute

trustee shall be appointed for the balance of the 18–month period specified in paragraph III(B) (2) or any extension thereof.

8. The trustee shall report in writing to Occidental and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

C. Occidental shall maintain the viability and marketability of MRT and shall not cause or permit the destruction, removal or impairment of any assets of MRT except in the ordinary course of business and except for ordinary wear and tear. Occidental shall use its best efforts to ensure that MRT continues to be an ongoing, viable enterprise engaged in the same business in which it is presently engaged.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Occidental has fully complied with the provisions of paragraphs II and III of this order, Occidental shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. Occidental shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of MRT, including the identity of all parties contacted. Occidental also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

V.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, Occidental shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used by (and still suitable for use by), any interest in or the whole or any substantial part of the stock or share capital of any natural gas transmission line located in whole or part in the St. Louis MSA; these prohibitions shall not relate to participation in any joint venture in which Occidental or MidCon is a participant on the date of service of this order or to the construction of new facilities.

VI.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Occidental and MidCon made to its principal office, Occidental and MidCon shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Occidental and MidCon relating to any matters contained in this order; and

B. Upon five days notice to Occidental and MidCon and without restraint or interference from them, to interview officers or employees of Occidental and MidCon who may have counsel present, regarding such matters.

VII.

It is further ordered, That Occidental shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

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